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CULTURAL RELATIVISM IN INTERNATIONAL WAR CRIMES PROSECUTIONS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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I. ABSTRACT

"While academic debates about the possibility of objective truth and falsehood are often rarified to the point of absurdity, Rwanda demonstrated that the question is a matter of life and death."¹

The tension between universalism and cultural relativism lies at the heart of war crimes and war crimes prosecutions. While cultural relativism arguments should never be the basis for ignoring war crimes outside of the West (particularly in Africa), neither should the international community adopt a radical universalist approach that ignores the unique circumstances underlying each war crimes prosecution. The establishment of the International Criminal Tribunal of Rwanda (hereinafter "ICTR"), over the objection of the post-genocide Rwandan government, probably erred on the side of universalism by ignoring the legitimate needs of the Rwandan people. Nevertheless, the ICTR has appropriately adopted a mild cultural relativist approach in its proceedings by considering cultural differences when evaluating witness testimony, interpreting the definition of certain crimes within the context of the Rwandan experience, and considering Rwandan sentencing practices when sentencing defendants. Future international tribunals should learn from the ICTR experience and consider cultural differences, as necessary, to do justice in the communities they are designed to serve.

II. INTRODUCTION

The creation of several new international war crimes tribunals over the past fifteen years raises a host of legal and policy issues concerning the way these tribunals seek to do justice. Arguably one of the most important issues is the role, if any, that cultural differences should play in the establishment and operation of these tribunals. This issue is important because the long-run legitimacy of the tribunals will depend on their acceptance by both the communities in which they seek to do justice, as well as the larger international community. This dual acceptance, in turn, will largely depend on the ability of these courts to recognize and take into account cultural differences that may affect their ability to uncover the truth, while also ensuring that people from all backgrounds are equally protected from (or held accountable for) the crimes under their jurisdiction.

There are easily recognizable truths on both sides of the debate. On the one hand, if the international community has universally condemned a

1. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 259 (1998) [hereinafter GOUREVITCH, *STORIES FROM RWANDA*].

particular crime, why should cultural differences play any role in how an international tribunal investigates and prosecutes that crime? On the other hand, how can international judges seek to adjudicate the guilt or innocence of individuals from a culture that is not their own, while also attempting to combine different legal cultures and receive evidence in a language that they do not speak, without recognizing and taking these differences into account?

Part III of this article explores this dilemma in general terms. First, the article will provide a brief summary of the debate between universalism and cultural relativism in the field of international human rights. The article will then argue that cultural relativism issues lie at the heart of war crimes and war crimes prosecutions. The very definition of war crimes is affected by cultural relativism, and relativism is often a subtext in debates about whether war crimes should be addressed by international, domestic, or hybrid courts. Moreover, even within the context of an international criminal tribunal, there is a need for cultural sensitivity in the way that tribunal seeks to do justice.

Part IV of this article applies these general observations to the establishment and operation of the International Criminal Tribunal for Rwanda (hereinafter "ICTR" or "Tribunal"). The facts leading up to the Rwandan genocide and the establishment of the ICTR will first be set out, with an eye towards the role that the international community played in these events. The article will then ask whether the establishment of the tribunal was reflective of a harmful "one-size-fits-all" attitude in the international community, or if it was a necessary step in order to accord justice equally in Africa as in Europe? It will also explore select decisions of the ICTR with an eye toward whether, and how, these decisions were influenced by real or perceived cultural distinctions between the international judges and the persons before them, specifically focusing on: 1) cultural factors that affect witness testimony; 2) the question of applying the international law of genocide in the Rwandan context; and 3) the role of culture in sentencing at the ICTR.

Part V will conclude that future international tribunals can learn a great deal from the ICTR experience. It will argue, generally, that sensitivity to cultural differences will assist international tribunals to be more effective in war crimes prosecutions, but that the international community must also be careful not to allow actual or perceived cultural differences to become an excuse to disregard or minimize war crimes. The article then specifically argues that international tribunals should follow the lead of the ICTR in its willingness to recognize and take into account cultural differences as they arise. Additionally, the article also argues that hybrid tribunals have a better chance of striking the proper balance in this respect. Finally, the article argues that any international or hybrid tribunal should exercise jurisdiction only when the domestic courts are unable or unwilling to do so. The article therefore advocates a mild cultural relativism approach to international war crimes prosecutions.

III. THE CULTURAL RELATIVISM DEBATE AND ITS APPLICATION TO WAR CRIMES AND WAR CRIMES PROSECUTIONS

A. *The Universalism-Cultural Relativism Debate*

One of the major ongoing debates in the field of international human rights is between the opposing views of universalism and cultural relativism. Put most starkly, the debate is between those who believe that “[h]uman rights are, literally, the rights that one has simply because one is a human being,”² regardless of an individual’s location, culture, or background, and those who maintain that at least some rights vary depending on a person’s culture.

According to Professor Jack Donnelly, a western political scientist, this debate is better understood as points along a continuum rather than as a choice between two extremes. At one end of the spectrum, radical cultural relativism holds that culture is the only source of the validity of a human right or rule.³ On the other end of the spectrum, radical universalism holds that culture is completely irrelevant to the validity of these rights and rules.⁴ Between these two extremes lies a continuum of views ranging from strong to weak cultural relativism.⁵ Strong cultural relativists would argue that culture is the principal source of the validity of a right or rule, but would nevertheless accept the universal validity and application of a few basic rights. Weak cultural relativists (strong universalists) would presume the universality of most rights and rules, but would hold that culture may also be an important source of the validity of others.⁶

In addition, one element of confusion that runs through this debate is that there are two different faces, or aspects, to cultural relativism, one generally positive, and the other negative. On the positive side, cultural relativism evolved largely as a reaction to the evils of colonialism. Given the fact that “African, Asian, and Muslim (as well as Latin American) leaders and citizens have vivid, sometimes personal, recollections of their sufferings under colonial masters,” there is an understandable sensitivity to external pressure.⁷ In addition, cultural relativism may be seen as a rejection of the West’s “moral imperialism,” or “the rush to judge another person’s flaws without revealing or

2. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 10 (2d ed. 2003) [hereinafter *DONNELLY, UNIVERSAL HUMAN RIGHTS*].

3. *Id.* at 89–90.

4. *Id.* at 90.

5. *Id.*

6. *Id.*

7. DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 99 (arguing that this sensitivity, though understandable, is not always justifiable).

recognizing one's own."⁸ Finally, as a practical matter, human rights activists are likely to be more effective if they ground their advocacy in local cultural norms.⁹

On the negative side, however, cultural relativism arguments are often used as an excuse to avoid responsibility for human rights violations. Thus, regime elites often make cultural relativism arguments in an "attempt to deflect attention from their [own] repressive policies."¹⁰ A related problem is that, although the community and the state are different entities, cultural relativism arguments sometimes "assume unjustifiably an identity between government objectives and cultural values."¹¹ "[P]articularly in states that lack democratic institutions, the crude cultural relativists' identification of the state—and its objectives—with the cultural values of its people remains dubious."¹²

Another slightly more subtle version of the negative face of cultural relativism is that of the international community ignoring or excusing human rights abuses that are occurring in a particular state. This may take the form of well-meaning westerners, aware of the largely negative legacy of western colonialism, failing to criticize arguments advanced by non-westerners "even when [those arguments] are . . . inaccurate or morally absurd."¹³ The negative side of cultural relativism may also take the more vicious form of neglect or

8. Berta Esperanza Hernandez-Truyol & Christy Gleason, *Introduction*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 8–9 (Berta Esperanza Hernandez-Truyol ed., 2002); see also DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 99 (noting that U.S. President Clinton expressed great indignation at the prospect of an American teenager being publicly caned in Singapore without "find[ing] it even notable that in his own country people are being fried in the electric chair."); see also Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 38 (1992) ("[I]t is extremely important to be sensitive to the dangers of cultural imperialism, whether it is a product of colonialism, a tool of international economic exploitation and political subjugation, or simply a product of extreme ethnocentricity. Since we would not accept others imposing their moral standards on us, we should not impose our own moral standards on them.").

9. See, e.g., Michael McDonald, *Reflections on Liberal Individualism*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 155 (Abdullahi Ahmed An-Na'im ed., 1992) ("Often appeal to local shared understandings [in denouncing practices such as torture, slavery, and genocide] has the practical advantage of touching a government or political movement more deeply than an appeal to international standards . . . [which] can be portrayed as alien and invasive, especially to collective autonomy."); see also An-Na'im, *supra* note 9, at 20 ("[S]ince people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards.").

10. DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 100.

11. Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 *VAND. J. TRANSNAT'L L.* 527, 586 (2001) (arguing that "in the Rwandan genocide of 1994, it was not culture per se, but a political elite's manipulation and exacerbation of preexisting socio-cultural divisions within Rwandan society that caused the systematic slaughter of Tutsi").

12. *Id.* at 587.

13. DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 100.

outright xenophobia, with an underlying attitude of “they’ve always been that way, why should we make any effort to change things now?”¹⁴

The anti-relativist, or universalist, stance is also strengthened by recognizing that relativist arguments are sometimes put forward by those cultures who would seem to need their protective value the least.¹⁵ For example, in the past the United States sometimes adopted a cultural relativist approach with regard to the juvenile death penalty, a practice widely recognized to be in violation of customary international law.¹⁶ Finally, Professor Donnelly argues, with some force, that in developing countries today, rather than “the persistence of traditional culture in the face of modern institutions . . . we usually see instead a disruptive and incomplete westernization, cultural confusion, or the enthusiastic embrace of ‘modern’ practices and values. In other words, the traditional culture advanced to justify cultural relativism far too often no longer exists.”¹⁷

B. Application of the Debate to War Crimes and War Crimes Prosecutions

1. Cultural Relativism and War Crimes

As in other areas of human rights, cultural relativism issues lie at the heart of war crimes and war crimes prosecutions. With respect to the crimes themselves, most scholars, including relativists, seem to agree that there are at least a small, core set of prohibitions that are universal.¹⁸ “Few today, for example,

14. Cf. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 284 (criticizing western commentators who, observing the serious post-colonial problems in Zaire, “took cynical solace in the conviction that this state of affairs was about as authentic as Africa gets. Leave the natives to their own devices, the thinking went, and—*Voilà!*—Zaire. It was almost as if we *wanted* Zaire to be the Heart of Darkness; perhaps the notion suited our understanding of the natural order of nations.”); Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 238–39 (1998) (discussing norm theory and social science studies that demonstrate that “[w]e respond to persons in need according to how normal or abnormal their plight seems to us. Thus, famines in Biafra evoke little response because we think they are normal in that part of the world.”).

15. See DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 99.

16. See Patrick D. Curran, *Developments: Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT’L L. 311, 315 (2004); see also *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (holding recently that the juvenile death penalty is unconstitutional, in part because of the “stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”).

17. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 411 (1984) [hereinafter Donnelly, *Cultural Relativism and Universal Human Rights*].

18. See, e.g. MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* xi, 66 (2002); Henry J. Richardson III, Book Note, *Imperatives of Culture and Race for Understanding Human Rights Law: Human Rights: A Political and Cultural Critique Makau Mutua*, 52 BUFF. L. REV. 511, 514–15, 517 (2004).

would resort to cultural relativism to defend cultural practices that sanction slavery, human sacrifice, or genocide.”¹⁹ Beyond this sense of agreement as to a small subset of crimes, however, the specifics of what acts are universally prohibited, and when they are prohibited, are seldom articulated.²⁰

In fact, one commentator, David Chuter,²¹ has pointed out that “there are few, if any, war crimes . . . that were not at some time regarded as permissible, if not actually praiseworthy, in various civilizations.”²² Moreover, Chuter argues that “international criminal justice [today] has a heavily Western, white, Anglo-Saxon character,” and that its “vocabulary and concepts are not neutral . . . [but instead] are culturally specific, constructed and manipulated by a very small number of countries, most of which have English as their native or second language.”²³ Chuter therefore concludes that international humanitarian law does not embody universal values, but rather “is in part a form of

19. Sloane, *supra* note 12, at 583; see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 126 n.145 (2004) (“[E]ven those inclined to embrace relativist positions on human rights never press their relativism to the point of overtly defending genocide or crimes against humanity.”).

20. See, e.g., An-Na’im, *supra* note 9, at 21 (“[D]espite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits, and values that can be identified and articulated as the framework for a common ‘culture’ of universal human rights. It would be premature in this exploratory essay to attempt to identify and articulate these interests, concerns, and so on, with certainty.”) (emphasis added); Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?* 16 J.L. & RELIGION 1, 5 (2001) (arguing that there is an “emerging international consensus on the nature of ‘war crimes’ and ‘crimes against humanity,’” but also noting that “[w]e are still in the midst of an international struggle to specify these categories [and] to give them legal definition . . .”); MUTUA, *supra* note 18 (“There are aspects of the official human rights corpus that I think are universal. Prohibitions against genocide, slavery, and other basic abominations violate humanity at the core. But beyond these obvious points of agreement, the ground becomes tricky.”) (emphasis added).

21. Chuter works for the British Ministry of Defense where he had responsibility for Balkans war crimes issues, and support to the ICTY. See DAVID CHUTER, *WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD* 299 (2003).

22. *Id.* at 10; see also *id.* at 17 (“Killings, wife-stealing (the basic story in Homer’s *Iliad*), cattle-rustling, and the spoiling of crops were among the staples of intergroup relationships in earlier times, and there was no sense that any of these acts was wrong, provided it was directed at a member of the out-group. Indeed, most heroic poetry (see Homer) praises deeds that today would be thought illegal as well as immoral.”).

23. *Id.* at 94. Chuter specifically argues that international humanitarian norms reflect western biases in their focus on individual guilt, imputation of command responsibility, and demand that soldiers disobey unlawful orders. *Id.* at 96–97; see also CHUTER, *supra* note 22, at 95 (“[n]one of the major players in the international humanitarian law game can dictate to others from a position of complete moral superiority: all have done things comparable to some of the atrocities of Rwanda and Yugoslavia in modern times, or they have excused similar behavior on the part of their allies. Likewise, all have blocked, or attempted to block, investigations by international authorities into their own conduct more recently.”).

neocolonialism, in the sense that it gives the West practical leverage to achieve political objectives such as the replacement of rulers or regimes.”²⁴

Even the term war crimes is problematic. In this paper, the term generally is used to refer to all of the crimes that fall under the jurisdiction of international criminal tribunals, including war crimes, crimes against humanity, and genocide. As such, it is useful shorthand, but it can also be confusing and deceptive, and inevitably means different things in different contexts.²⁵ In fact, “each successive international court has tended to define the categories of war crimes and crimes against humanity with new components or variations. . . .”²⁶

Moreover, the crimes that fall under this broad umbrella are international crimes only because of the context in which they take place. In other words, rape is rape, and murder is murder, but sometimes they are international as well as domestic crimes and sometimes not. In general, it depends on whether they take place during an armed conflict or in a situation where the violence is “widespread and systematic” in nature—all inquiries that are somewhat subjective.²⁷ Finally, within the context of an armed conflict, it is typically the character of the victim as a civilian or other non-combatant that makes a certain act a crime, and there is often a degree of subjectivity in the definitions of combatants and non-combatants.²⁸

24. *Id.* at 95.

25. *Id.* at 3 (“[T]he expression war crimes . . . needs to be used with great care. Neither the [ICTY] nor the [ICTR] tribunals punish war crimes—they punish serious violations of international humanitarian law. Confusingly, the Statute of the [ICC] does refer to war crimes, but in a context that is describing what was called Violations of the Laws or Customs of War or Grave Breaches of the Geneva Conventions in the past. It is a mistake to assume that war crimes are a conceptual category all their own.”).

26. Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 235 (2004).

27. See, e.g., CHUTER, *supra* note 22, at 77–78 (“violations of the laws or customs of war, as well as grave breaches of the Geneva Conventions, require an armed conflict of some kind if they are to be charged. . . . [The ICTY’s] statute requires it to prove the existence of an armed conflict first before crimes against humanity can be charged. (This stipulation is not found in the statute for the [ICTR] or in the ICC Statute.)”); *id.* at 214–15 (the requirement of an armed conflict “has been dropped in the ICC Statute . . . [b]ut the other requirement for the proof of crimes against humanity is that the atrocities should be ‘widespread and systematic,’ which is to say that random atrocities, even conducted on a large scale and very brutally, would not qualify unless there were an underlying plan of some kind.”); see also Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT’L L. 145, 160 (2003) (“[J]udging individual acts of criminal responsibility always presupposes some normative context, but in many cases involving alleged war crimes, it is that very context that is the subject of dispute. As soon as the law tries to assess that larger historical and political context, the law moves into areas of indeterminacy and political conflict.”).

28. See e.g., CHUTER, *supra* note 22, at 80 (“[a]ny troops sent into Rwanda in 1994 to ‘stop the genocide’ would have found themselves firing on women and children, who made up a substantial proportion of the Hutu killers.”).

Thus several levels of contextual nuance surround the definition of war crimes, all of which will be impacted by the cultural viewpoints of, *inter alia*, the victims, perpetrators, judges, and others who create and interpret international humanitarian law. It is, therefore, unsurprising that cultural relativism arguments also play a large role in determining the appropriate response to war crimes when they occur, particularly the response by the international community.

2. Cultural Relativism and Responses to War Crimes

Since the end of the Cold War, the international community, and particularly the United Nations (hereinafter "U.N."), has begun to respond more and more often to the occurrence of war crimes throughout the world. In many cases, that international response has taken the form of the establishment of an international legal tribunal. First, in 1993 the U.N. Security Council created the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY") in response to atrocities in the Balkans during the various conflicts in that region.²⁹ Then in 1994, the Security Council created the ICTR in response to the Rwandan genocide of that same year.³⁰ In addition, several hybrid courts, combining national and international judges and law, have also been established or discussed—most notably in Sierra Leone, Kosovo, East Timor, and Cambodia.³¹ Finally, the long-awaited International Criminal Court (hereinafter "ICC"), the first ever permanent, treaty-based international criminal court, was established in July 1998, and the Rome Statute governing the jurisdiction and functioning of the court entered into force in July 2002.³²

29. See S.C. Res. 808, ¶ 13, U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding in principle to establish the tribunal); S.C. Res. 827, ¶ 9, U.N. Doc. S/RES/827 (May 25, 1993) (adopting the Statute of the tribunal); see also VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* vol. 1, at 30–31 (1998); Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 354 (2001).

30. See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994); see also MORRIS & SCHARF, *supra* note 29, at 72; Nizich, *supra* note 29, at 354.

31. See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 296–300 (2003); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1070–71 (2003); Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55 (2003); Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?*, 98 AM. SOC'Y INT'L L. PROC. 192 (2004) [hereinafter Wald, *Accountability for War Crimes*].

32. See Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; see also International Criminal Court, *About the Court* (2005), <http://www.icc-cpi.int/about.html>.

Yet if “[l]aw is a form of cultural expression and is not readily transplantable from one culture to another . . . ,”³³ then the creation of international criminal tribunals will necessarily have implications for the cultural relativism debate. The concept of universal jurisdiction over war crimes is largely accepted and “there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers.”³⁴ There is also, however, a healthy body of scholarship that argues that purely outsider prosecution is a flawed response to war crimes.

For example, in critiquing the international community’s response to the Rwandan genocide, including the establishment of the ICTR, Professor Jose Alvarez has argued that “the international community needs to be responsive to the *idiosyncratic conditions* that gave rise to massive violations of human rights as well as to the conditions prevailing in those societies in the immediate wake of atrocities.”³⁵ Professor Alvarez asserts that his critique “is not premised on cultural relativism,”³⁶ however, he does admit that there may be “idiosyncratic cultural or historical reasons why Rwandans or other groups may resist solutions designed or imposed by the international community,” and he agrees that some of those reasons are suggested by his analysis.³⁷

Similarly, in an analysis of the effectiveness of both the ICTR and the ICTY, Ivana Nizich, a former intelligence analyst and research officer for the ICTY, has opined that “[t]he international community cannot have an elitist, paternalistic attitude toward [war] crimes and toward the victims of these crimes, *i.e.*, viewing local participation as inherently biased, tribal, inexperienced, and inept.”³⁸ Nizich also argues that “hybrid attempt[s] to fuse international and national participation in adjudicating war crimes may, in some cases, be preferable [to] the ‘elitist’ models (*i.e.*, the ICTY and ICTR).”³⁹ Again, though not specifically using the language of cultural relativism, the subtext to this argument is that the hybrid tribunals will better understand and reflect cultural values and be less prone to the moral imperialism dangers of a radical universalist approach.

33. MARY ANN GLENDON, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 10 (1982). See also Kristina D. Rutledge, Note, “*Spoiling Everything*”—*But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151 (2004).

34. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 366 (1999).

35. *Id.* at 370 (emphasis added); see discussion *infra* Part IV (exploring the Rwandan situation and the ICTR).

36. Alvarez, *supra* note 34, at 369.

37. *Id.*

38. Nizich, *supra* note 29, at 364.

39. *Id.* at 363; see also discussion *infra* Part V (returning to the advantages of hybrid tribunals).

Finally, Professor Mark Drumbl has argued that “although all genocides are among the most serious crimes of concern to the international community as a whole,” nevertheless, “each genocide is unique . . . [and] the modalities of securing accountability and encouraging healing should vary in each individual case.”⁴⁰ Professor Drumbl thus argues that policy responses to war crimes should be based on a “contextual approach” rather than a “deontological approach . . . [that] posits that trials of selected individuals (preferably undertaken at the international level) constitute the favored and often exclusive remedy to respond to all situations of genocide and crimes against humanity.”⁴¹ Although he hesitates to specifically invoke the language of cultural relativism,⁴² Professor Drumbl clearly embraces at least some aspects of the theory, arguing that “[p]rocesses based on local culture and regional practice may create a greater sense of familiarity among victims than the potentially alienating procedure of trials.”⁴³ Thus the subtext of cultural relativism is present, and should be recognized, in this and other debates about the relative value of international versus domestic responses to war crimes.

3. Cultural Relativism Within International War Crimes Prosecutions

As this discussion illustrates, the response to war crimes that reflects the most universalist approach is that of an international war crimes tribunal such as the ICTY or ICTR. Nonetheless, even given a decision to address war crimes through the use of an international prosecutorial body, there may still be room for cultural sensitivity in how that body goes about doing justice.

Of course one could argue that the philosophy underlying international war crimes prosecutions is diametrically opposed to the idea of cultural relativism.

40. Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1224–1225 (2000) (quoting Rome Statute of the International Criminal Court, Preamble, U.N. Doc. A/CONF.183/9 (1999)) [hereinafter Drumbl, *Punishment, Postgenocide*]; see also Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 548 (2005) (“[I]nterpretations of justice are often multi-layered and, for many people, take root in national and local contexts.”) [hereinafter Drumbl, *Collective Violence and Individual Punishment*].

41. Drumbl, *Punishment, Postgenocide*, *supra* note 41, at 1228.

42. See, e.g., Drumbl, *Collective Violence and Individual Punishment*, *supra* note 41, at 602 (“Cultural relativism should not impede the establishment of a system-wide norm that holds accountable those individuals who perpetrate acts of great wickedness. There is no culture that views the infliction of such acts as tolerable.”).

43. Drumbl, *Punishment, Postgenocide*, *supra* note 41, at 1265; see also Drumbl, *Collective Violence and Individual Punishment*, *supra* note 41, at 548–49, 610 (“[A]t a minimum, some space should be retained in this accountability process for alternative (and perhaps competing) mechanisms, such as those that draw from local custom, national practices, or indigenous legal process. . . . I propose . . . that international criminal law and punishment contemplate communitarian underpinnings, in which international norms become sedimentary integrated into communities in a manner that takes into account cultural needs instead of imposing cultural values.”).

For example, Justice Richard Goldstone, the former Chief Prosecutor for the ICTY and ICTR, has called cultural relativism "a dangerous trend" and has argued that it should play no role in war crimes prosecutions.⁴⁴ Indeed, we would be appalled if an international war crimes tribunal judged the architect of a genocide in Africa differently from the architect of a genocide in Europe on the basis that the African defendant's actions reflected a part of his culture with which the international community should not interfere.

Yet, at the same time, culture, and cultural differences, have been and will continue to be an undeniable fact of life for all parties involved with international tribunals. International tribunals typically consist of legal officers (judges, prosecutors, defense attorneys, and staff) who come from different cultures than the defendant and/or victims.⁴⁵ As Judge Patricia Wald has noted with respect to the ICTY,

[The ICTY] tries suspects in a country to which they have no ties and sentences them to prison in other foreign countries. To many internationalists this may reflect a triumph, but there are also voices urging caution. . . . Our judicial systems, with their peculiar rights and remedies, are products and reflections of our unique political and cultural notions.⁴⁶

If international legal officers refuse to acknowledge this reality, and instead simply judge the witnesses, facts, and defendant's behavior solely based on their own cultural norms, it is less likely that justice will result. We would, therefore, want these judges to acknowledge and consider cultural differences as they proceed.

Thus one could accept the universal validity and application of certain war crimes, but nonetheless see a role for cultural sensitivity in how an international war crimes tribunal operates. To return to Professor Donnelly's thesis, cultural relativism arguments can apply to either the substance of human rights, the interpretation of particular rights, and/or the form in which those rights are implemented.⁴⁷ One could, for example, advocate a universalist position with

44. Justice Richard Goldstone, Symposium: *Prosecuting International Crimes: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 11 (1997).

45. See, e.g., Drumbl, *Punishment, Postgenocide*, *supra* note 41, at 1259 (Professor Drumbl notes that the ICTR prosecutions are "held in Tanzania, . . . where the language of the trial may not be understandable to all Rwandans, . . . [and] where the trials may be encumbered by foreign (and seemingly technical) procedures."); see discussion *infra* Part IV (returning to a discussion of the specific impact that cultural or language differences have had at the ICTR).

46. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemma of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 117 (2001) [hereinafter Wald, *The International Criminal Tribunal*].

47. See DONNELLY, *UNIVERSAL HUMAN RIGHTS*, *supra* note 3, at 90, 96-98.

respect to a substantive list of human rights (e.g., protection against genocide), but also allow culture-based deviations from international norms at the level of interpretation (e.g., how genocide is defined in a particular situation) or at the level of form and implementation (e.g., how a tribunal goes about investigating and prosecuting an alleged genocide).

IV. CULTURAL RELATIVISM AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

With these general observations in mind, it will be helpful at this point to apply them to a specific case study. The ICTR is an ideal subject for this study because several aspects of the cultural relativism debate have resonated throughout the Rwandan experience. Moreover, the Tribunal has considered cultural differences in the course of fulfilling its mandate, thus illustrating the importance of these issues even when operating within a universalist framework.

A. History of the Rwandan Genocide and the Establishment of the ICTR

1. Rwandan History Through 1994

The history leading up to the Rwandan genocide is well documented elsewhere.⁴⁸ However, a brief recitation of the relevant facts here—with special emphasis on the role that the international community played in these events—will assist us in evaluating the relevance of cultural relativism to the establishment and work of the ICTR.

On April 6, 1994, the Rwandan President, Juvénal Habyarimana, was killed when his plane was shot down by a surface-to-air missile.⁴⁹ This incident sparked the widespread and systematic murder of between 500,000 and 1,000,000 civilians—mostly Tutsis—throughout the country.⁵⁰ When the violence subsided, more than seventy-five percent of Rwandan's ethnic Tutsi population had been slaughtered.⁵¹ The scale of the violence was unprecedented; the murders occurred at almost three times the rate of the killing of Jews during the Holocaust.⁵² Yet this genocide was not a spontaneous

48. See generally GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2; MORRIS & SCHARF, *supra* note 29, at 47; GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995).

49. See MORRIS & SCHARF, *supra* note 29, at 47.

50. *Id.*

51. *Id.*

52. See Philip Gourevitch, *After the Genocide*, *THE NEW YORKER*, Dec. 18, 1995, at 78; Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 *EUR. J. INT'L L.* 501, 502 (1996).

uprising, nor the inevitable result of ancient tribal warfare. It was carefully planned, and, most agree, fully preventable by the international community.⁵³

Rwanda is composed primarily of two ethnic groups: the Hutu majority and the Tutsi minority.⁵⁴ Yet these two groups historically “spoke the same language, followed the same religion, intermarried, and lived intermingled, without territorial distinctions . . . sharing the same social and political culture in small chiefdoms.”⁵⁵ In fact, because of the great degree of intermixing throughout the years, ethnographers and historians question whether the Tutsi and Hutu are in fact distinct ethnic groups.⁵⁶ Rather, the main historic distinction between the two groups was economic: “Hutus were cultivators and Tutsis were herdsman.”⁵⁷ Because being a herdsman was a more prosperous vocation, the minority Tutsi eventually emerged as an aristocratic elite; however, the lines between the two groups remained porous.⁵⁸

Nevertheless, when European colonizers arrived in Rwanda at the end of the nineteenth century, they quickly seized on real or perceived differences between the two groups in order to further their own brand of “race science.”⁵⁹ As Phillip Gourevitch describes it in his history of the Rwandan genocide:

[W]hen the Europeans arrived in Rwanda at the end of the nineteenth century, they formed a picture of a stately race of warrior kings, surrounded by herds of long-horned cattle and a subordinate race of short, dark peasants, hoeing tubers and picking bananas. The white

53. See MORRIS & SCHARF, *supra* note 29, at 48; but see CHUTER, *supra* note 22, at 123–24 (criticizing the *post hoc* calls for intervention in Rwanda as unrealistic).

54. See MORRIS & SCHARF, *supra* note 29, at 48. A third ethnic group, the Twa, comprise approximately two percent of the Rwandan population. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 15, U.N. Doc. E/CN.4/1997/61 (Jan. 20, 1997) (prepared by René Degni-Ségui).

55. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 47. Although the Tutsis are generally described as tall and lanky, with aquiline noses and longer jawbones, and the Hutus as stocky, dark-skinned, and round-faced, “[n]ature presents countless exceptions.” *Id.* at 50. Moreover, intermarriage was common, and “through marriage and clientage, Hutus could become hereditary Tutsis, and Tutsis could become hereditary Hutus.” *Id.* at 47; see also MORRIS & SCHARF, *supra* note 29, at 48–49.

56. See MORRIS & SCHARF, *supra* note 29, at 49. See also GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 48 (stating that “ethnographers and historians have lately come to agree that Hutus and Tutsis cannot properly be called distinct ethnic groups.”).

57. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 48; see also MORRIS & SCHARF, *supra* note 29, at 49.

58. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 48; see also MORRIS & SCHARF, *supra* note 29, at 49.

59. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 50; see also MORRIS & SCHARF, *supra* note 29, at 49.

men assumed that this was the tradition of the place, and they thought it a natural arrangement.⁶⁰

Thus to conform reality to their vision of it, the colonizers encouraged and deepened the divide between the two groups. The Germans, and then the Belgians set up a policy of indirect colonial rule, with the Tutsis serving as feudal lords on the Europeans' behalf.⁶¹ The Belgians also furthered the division of Hutu and Tutsi by "conduct[ing] a census for the purpose of issuing identity cards which labeled every Rwandan as a Hutu, a Tutsi, or a Twa."⁶² A person's classification was based on patrilineal lineage, and membership in a particular group became increasingly rigid.⁶³

Naturally, the majority Hutu population resented the assumption of Tutsi superiority and the imposition of Tutsi rule by the Europeans.⁶⁴ After World War II, as independence movements spread throughout Africa, the Belgians began to sympathize with the Hutus desire for self-determination.⁶⁵ The Hutus therefore seized power in Rwanda in 1959,⁶⁶ and the first wave of systematic political violence between Hutus and Tutsis followed. During the next few years, over 100,000 Tutsis fled the country in the face of mass killings.⁶⁷

Throughout the 1970s and 1980s, Rwanda was a dictatorship ruled by the French-supported President Habyarimana, and France brought the country within its "neocolonial sphere in Francophone Africa."⁶⁸ During this same time period, the exiled Tutsis attempted several times to invade Rwanda and overthrow the government. After each unsuccessful attempt, Tutsis in Rwanda would be massacred by the thousands.⁶⁹

In 1990, the largely Tutsi refugee army known as the Rwandan Patriotic Front (hereinafter "RPF") attacked again, and France responded by sending arms to Rwanda and providing a contingent of troops to fight with the Rwandan army.⁷⁰ In late 1992, the fighting between the Rwandan army and the RPF

60. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 50.

61. See MORRIS & SCHARF, *supra* note 29, at 49; see also GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 54.

62. MORRIS & SCHARF, *supra* note 29, at 49.

63. *Id.* at 49–50.

64. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 57–58.

65. *Id.* at 58.

66. *Id.* at 59; MORRIS & SCHARF, *supra* note 29, at 50.

67. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 59; MORRIS & SCHARF, *supra* note 29, at 50.

68. MORRIS & SCHARF, *supra* note 29, at 50.

69. *Id.*; GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 65 ("The British philosopher, Sir Bertrand Russell, described the scene in Rwanda in 1964 as the most horrible and systematic massacre we have had occasion to witness since the extermination of the Jews by the Nazis.").

70. See generally GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 88; MORRIS & SCHARF,

forces reached a stalemate, and the two camps began negotiating a series of agreements that culminated in the August 1993 Arusha Peace accords.⁷¹ "[C]rucially, throughout the peace-implementation period a United Nations peacekeeping force would be deployed in Rwanda."⁷²

Hutu extremists, many of whom were close to President Habyarimana, were strongly opposed to the peace agreement, even as Hutu moderate opposition parties gained increasing support among the Rwandan population.⁷³ To shore up his support among the Hutus, President Habyarimana soon sought to again unite them against a common enemy—the Tutsis.⁷⁴ In 1993, a training camp for the Hutu militia was established, providing groups of 300 Hutus at a time with courses "on methods of mass murder and indoctrination in ethnic hatred."⁷⁵ The Rwandan authorities distributed six million dollars worth of firearms provided by France to militia members and other Habyarimana supporters; in addition, "machetes were imported *en masse* from China and stored in secret caches throughout the country."⁷⁶

In early 1994, the commander of the U.N. peacekeeping force in Rwanda (hereinafter "UNAMIR"), Major General Romeo Dallaire, sent a cable to the U.N. Headquarters warning that the Hutu hard-liners were planning a genocidal massacre of the Tutsis.⁷⁷ In the weeks following, he made repeated requests for reinforcements and sought authorization to use force to seize the weapons caches, but U.N. officials, still stinging from the death of U.S. soldiers in peacekeeping operations in Somalia, refused these requests.⁷⁸

This set the stage for the mass genocide that began in April 1994. Almost instantly after Habyarimana was assassinated, Hutu soldiers and the newly trained militia began to hunt down and kill Tutsi civilians and moderate

supra note 29, at 50; see also GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 89 (noting that France continued to funnel huge arms shipments into Rwanda "right through the killings in 1994 . . . [i]nitially, Belgium and Zaire also sent groups to back up [Habyarimana's forces], but the Zaireans were so given to drinking, looting, and raping that Rwanda soon begged them to go home, and the Belgians withdrew of their own accord.").

71. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 99; MORRIS & SCHARF, *supra* note 29, at 50–51.

72. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 99.

73. See MORRIS & SCHARF, *supra* note 29, at 51.

74. *Id.* (quoting Gourevitch, *After the Genocide*, *supra* note 53, at 86.)

75. MORRIS & SCHARF, *supra* note 29, at 52. See also The Secretary-General, Letter Dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, Annex ¶ 65, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, delivered to the Security Council, U.N. Doc. S/1994/1405 (Dec. 9, 1994) [hereinafter *Final Report*].

76. MORRIS & SCHARF, *supra* note 29, at 52.

77. *Id.* at 52–53; GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 103–05.

78. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 105–06; MORRIS & SCHARF, *supra* note 29, at 53.

Hutus.⁷⁹ Barricades were erected on major thoroughfares, at which members of the Hutu Presidential Guard inspected identity cards and executed those who had a Tutsi identity card or were perceived to have Tutsi physical traits.⁸⁰ Tutsis were hunted down and killed through house-to-house searches, and Tutsis who sought refuge at churches or hotels were often surrounded by soldiers and massacred.⁸¹ Hundreds of thousands of Tutsis were murdered, and tens of thousands of Tutsi women were raped and/or sexually mutilated.⁸²

In the meantime, Belgium withdrew from the U.N. peacekeeping force after a contingent of ten Belgian U.N. Peacekeepers were captured, tortured, and murdered.⁸³ On April 21, 1994, the U.N. Security Council passed a resolution that ordered the retreat of all but 270 U.N. peacekeeping troops.⁸⁴ The United States not only sought to avoid involvement with peacekeeping missions but also urged others not to undertake missions that it wished to avoid.⁸⁵ When other countries began pushing for the return of U.N. troops, the United States demanded control of the mission and then encouraged the Security Council to delay the deployment of troops.⁸⁶ By a strange coincidence, the Rwandan government occupied a rotating seat on the Security Council at this time.⁸⁷

At the same time, French diplomats were depicting the massacre as a "mass popular outrage" in response to the President's assassination.⁸⁸ France also encouraged the view that the killing was an extension of the war with the RPF, and that the RPF was either the greater offender, or that at most a two-way genocide was taking place; "in short, that Rwandans were simply killing each other as they were wont to do, for primordial tribal reasons, since time immemorial."⁸⁹ France also launched "Operation Tourquoise," which the Security Council endorsed, and gave permission to use force.⁹⁰ "Operation Turquoise" set up a safe zone in southwestern Rwanda, but many asked "safe for whom?"⁹¹ The operation did rescue at least 10,000 Tutsis, but thousands more were killed in the zone under France's control.⁹² The Hutu government

79. See MORRIS & SCHARF, *supra* note 29, at 53.

80. *Id.* at 54; see also *Final Report*, *supra* note 76, ¶ 69.

81. See *Final Report*, *supra* note 76, ¶¶ 69–72.

82. See MORRIS & SCHARF, *supra* note 29, at 55.

83. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 114, 150.

84. *Id.* at 150.

85. *Id.*

86. *Id.* at 151.

87. See MORRIS & SCHARF, *supra* note 29, at 60.

88. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 154.

89. *Id.*; see also *id.* at 156.

90. *Id.* at 155–56.

91. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 157.

92. *Id.* at 158.

even moved its radio station into the French zone and continued to broadcast incitements to kill Tutsis.⁹³

Nevertheless, by mid-July, the RPF had pushed its way to the capital, and hundreds of thousands of Hutus had fled into Southwest Rwanda and Zaire (now the Democratic Republic of the Congo).⁹⁴ On July 18, the Hutu extremist government fled the country and the RPF established a new coalition government with the surviving members of the anti-Hutu power opposition parties.⁹⁵ Thus the genocide ended, but Rwanda was left with hundreds of thousands dead and wounded, and hundreds of thousands of murderers and accomplices.

2. After the Genocide: The International Community's Response

The international community had failed to prevent or stop the genocide, but it nevertheless quickly turned to the question of what it might do to help bring the perpetrators to justice.⁹⁶ The Rwandan penal system had been completely decimated,⁹⁷ and the new government—which now occupied the Rwandan seat on the Security Council—began pressing for a war crimes tribunal similar to the ICTY, set up the previous year.⁹⁸

However, many on the Security Council were resistant to the idea of a “costly international investigation and a tribunal which the United Nations could ill-afford.”⁹⁹ Such resistance was harshly criticized, and some suggested that it smacked of racism.¹⁰⁰ As one commentator noted:

[H]ad the sequence of events between the Yugoslav and Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established. On the basis of international

93. See MORRIS & SCHARF, *supra* note 29, at 61.

94. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 162; see generally *id.* at 156 (noting those fleeing included many who had been responsible for the killings and that they “were indiscriminately received with open arms by UN and humanitarian agencies and accommodated as refugees in giant camps.”); see also MORRIS & SCHARF, *supra* note 29, at 60.

95. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 162; MORRIS & SCHARF, *supra* note 29, at 58.

96. See MORRIS & SCHARF, *supra* note 29, at 61.

97. See Jose Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT’L & COMP. L. 359, 369 (1999) (noting that, after the genocide, there were “sixteen lawyers left alive” in Rwanda); see also Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT’L L.J. 391, 406 (2001) (noting that “the genocide in Rwanda left the judicial system virtually destroyed—approximately ninety-five percent of the country’s lawyers and judges were killed, exiled, or imprisoned”).

98. See MORRIS & SCHARF, *supra* note 29, at 62.

99. *Id.*

100. *Id.*

responses to other situations, it has been suggested that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda Tribunal was established [only] because of the precedential effect of the Yugoslav Tribunal.¹⁰¹

Or as the Prime Minister, delegate of the new Rwandan coalition government, asked, "Was a war crimes court not set up in Germany? Is it because we're Africans that a court has not been set up [for Rwanda]?"¹⁰²

Thus, in November 1994, the Security Council established the ICTR.¹⁰³ In a strange turn of events, however, Rwanda was the only member of the Security Council to vote against the Resolution that created the Tribunal.¹⁰⁴ Although it had initially requested its creation, as negotiations progressed Rwanda objected to a number of the provisions in the Tribunal's governing statute.¹⁰⁵ First, Rwanda objected because the ICTR would have jurisdiction only over crimes committed during the 1994 calendar year,¹⁰⁶ which would prevent the ICTR from fully investigating the activities that led up to the genocide.¹⁰⁷ Second, Rwanda objected that the ICTR would be understaffed and underfunded, with only a handful of judges and with the appellate body and chief prosecutor to be split between the ICTR and the ICTY.¹⁰⁸ Third, Rwanda objected to the fact that the seat of the court would be in Tanzania rather than Rwanda, which would make it more difficult for the Rwandan people to follow the court's proceedings.¹⁰⁹

Finally, Rwanda objected to the fact that the Tribunal's statute prohibits the imposition of the death penalty.¹¹⁰ This objection was tied to the fact that the ICTR was never expected to try more than a handful of defendants, and that it would focus on the regime elites who had the greatest role in organizing and executing and the genocidal plan.¹¹¹ Because the Rwandan Penal Code provides for the death penalty, "[t]hose most responsible for the killings" would not face the death penalty, while lower-level perpetrators tried in the Rwandan

101. Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996).

102. MORRIS & SCHARF, *supra* note 29, at 62.

103. *Id.* at 72; see generally Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598.

104. See MORRIS & SCHARF, *supra* note 29, at 72.

105. See Madeline H. Morris, *Justice in the Wake of Genocide*, in WAR CRIMES: THE LEGACY OF NUREMBERG 213 (Belinda Cooper ed., 1999) [hereinafter Morris, *Justice in the Wake of Genocide*].

106. See Statute of the International Tribunal for Rwanda, *supra* note 105, at art. 7.

107. See Morris, *Justice in the Wake of Genocide*, *supra* note 107, at 213.

108. *Id.* at 214.

109. See MORRIS & SCHARF, *supra* note 29, at 68.

110. See Morris, *Justice in the Wake of Genocide*, *supra* note 109, at 214.

111. See CHUTER, *supra* note 22, at 221.

courts might be executed.¹¹² Similarly, Rwanda argued that the prison terms for those convicted at the Tribunal should be served in Rwanda, and “not in some posh facility in Europe.”¹¹³

These specific disputes also reflected Rwanda’s broader frustration with the international community. Many felt that Rwanda needed international assistance to fit its unique situation, but instead the international community applied a cookie-cutter approach by establishing a tribunal that was “essentially a weaker, more impoverished replica” of the ICTY.¹¹⁴ Moreover, whereas at the time of the establishment of the ICTY there was little reason to expect serious local prosecutions of war crimes perpetrators, the situation with Rwanda was different—“local authorities were willing to prosecute and could have used extensive international assistance to make such efforts more credible.”¹¹⁵ Instead, international resources that could have gone to rebuild the shattered Rwandan justice system were diverted to the ICTR.¹¹⁶ Thus some have argued that the existence of the ICTR is more a reflection of internationalist priorities than a genuine response to the needs of the Rwandan victims.¹¹⁷

B. Cultural Relativism and the Rwandan Experience

This history—both of the Rwandan genocide and of the establishment of the ICTR—illustrates several of the issues in the universalist/cultural relativist debate discussed *supra*. In fact, both universalists and cultural relativists can find support for their positions in these facts.

1. The Universalist Response

First, a universalist could point out that certain real or perceived elements of Rwandan culture appear to have contributed to the genocide. For example, Rwandans and non-Rwandans alike often speak of the culture of impunity that

112. *Id.*

113. MORRIS & SCHARF, *supra* note 29, at 68 (“[P]risons that house convicted criminals indicted by the ad hoc tribunals have to meet minimum U.N. standards, and these standards are often higher than average Africans would expect in their private homes.”); see also CHUTER, *supra* note 22, at 221; Drumbl, *Collective Violence and Individual Punishment*, *supra* note 41, at 579 (noting also that many victims as well as perpetrators of the violence in Rwanda are HIV-positive, and that prisoners of the ICTR have access to medical care that is not available to most of the victims).

114. Alvarez, *supra* note 99, at 369–70; GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 252 (quoting one Rwandan diplomat as saying that “We asked for help to catch these people who ran away and to try them properly in our own courts . . . [but instead] the Security Council just started writing ‘Rwanda’ under the name ‘Yugoslavia’ everywhere.”).

115. Alvarez, *supra* note 99, at 370.

116. *Id.* (stating that resources “reaching between \$40 and \$50 million a year” were going to the international tribunal).

117. *Id.* at 370.

prevailed prior to 1994.¹¹⁸ Although this is more in the nature of rhetoric—meaning simply that perpetrators of previous abuses had gone unpunished—than an assertion of an actual cultural value, the use of the word is nonetheless telling. Moreover, there does appear to have been a cultural norm that encouraged inter-ethnic violence in Rwanda, especially when that violence was orchestrated and ordered by community leaders.¹¹⁹ This aspect of Rwandan society is sometimes referred to as a culture of obedience.¹²⁰

[T]here had always been a strong tradition of unquestioning obedience to authority in the pre-colonial kingdom of Rwanda. This tradition was of course reinforced by both the German and the Belgian colonial administrations. And since independence the country has lived under a well-organized tightly-controlled state. When the highest authorities in that state told you to do something you did it, even if it included killing.¹²¹

To the extent that these can be considered cultural values or traits, a universalist approach would argue, correctly, that these traits are not worthy of protection.

In addition, as illustrated by the history of Rwanda discussed *supra*, Rwanda is an example of “disruptive and incomplete westernization [and] cultural confusion . . .,” and thus cultural relativism arguments have less force when applied to modern Rwandan culture.¹²² Indeed, the supposedly ancient tribal conflicts between Hutu and Tutsi in Rwanda are directly rooted in the legacy of colonialism, and until “1959 there had never been systematic political violence recorded between Hutus and Tutsis—anywhere.”¹²³ As one scholar has pointed out, the “simplistic ‘tribal war thesis’ is often a reflection of ethnocentrism, if not an expedient absolution from apathy in the face of immense human suffering.”¹²⁴ This version of ethnocentrism thus reflects one

118. See, e.g., Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT’L L. 325, 333 (1997).

119. See GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 123 (“During the genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land, and every citizen was responsible for its administration.”).

120. See Akhavan, *supra* note 120, at 335.

121. PRUNIER, *supra* note 49, at 245; see also Drumbl, *Collective Violence and Individual Punishment*, *supra* note 41, at 568 (“[I]n certain circumstances, those who commit extraordinary international crimes are the ones conforming to social norms whereas those who refuse to commit the crimes choose to act deviantly.”).

122. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, *supra* note 18.

123. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 59.

124. Akhavan, *supra* note 122, at 329.

aspect of the negative face of cultural relativism—the outsider dismissing human rights abuses on the grounds that it is just their culture, so there's nothing that we can do about it.

Similarly, with respect to the establishment of the ICTR, the universalism argument directs our attention to the admonitions by Rwandans and others that genocide in Africa is just as worthy of international adjudication as is genocide in Europe. Indeed, we must avoid cultural relativism arguments in cases where such arguments are nothing more than a way for the international community—particularly the West—to avoid responding to horrors that take place in cultures that do not more closely resemble our own.

2. The Cultural Relativist Response

The history of Rwanda and the establishment of the ICTR provides support for cultural relativism arguments as well. Cultural relativism is, at least in part, a response to colonialism and the harm that comes from outside (particularly western) influences in another culture. Given the fact that the Tutsi/Hutu distinction and ultimate conflict was largely furthered through western influence—based on then-current notions of race and ethnicity—Rwanda would be justified in resisting further impositions of western values, even if those values are now couched in terms of assistance rather than conquest. Moreover, given the failure of the international community to prevent or stop the genocide, as well as the cooperation of some western states with the regime that perpetrated the genocide, Rwanda would be correct to greet any new offer of western help with skepticism.

In addition, elements of moral imperialism (the “negative face” of universalism) can be found in the Security Council's decision to create the ICTR in spite of the objections by the post-genocide Rwandan government. This decision may reflect the perception “that the Rwandan judiciary was incapable of reaching just verdicts,” and that “any trials that Rwanda might hold . . . [would be] beneath international standards.”¹²⁵ This perception is furthered by the fact that the ICTR has primary jurisdiction in any case that fits under its mandate, meaning that it may require Rwandan (or other) domestic courts to relinquish any defendant falling under its mandate to its jurisdiction.¹²⁶ While this does not necessarily reflect insensitivity to specific Rwandan cultural values, it does imply that the international community is a better judge of Rwandan events than are Rwandans. This is questionable, in light of the international community's actions leading up to and during the genocide; and

125. GOUREVITCH, *STORIES FROM RWANDA*, *supra* note 2, at 252–53.

126. See, e.g., Madeline H. Morris, *Rwandan Justice and the International Criminal Court*, 5 ILSA J. INT'L & COMP. L. 351, 354 (1999) [hereinafter Morris, *Rwandan Justice*].

dangerous, as it may encourage the perception of Rwanda as lawless, tribal, or primitive (a perception that universalists would also seek to avoid).

C. The Role of Culture in ICTR Trials and Decisions

By looking at Rwanda through the lens of the universalist/cultural relativist debate, we can see that there are truths—and dangers—in both lines of thought. This section will now turn to the question of what role, if any, cultural sensitivity does or should play in the operation of the Tribunal. As demonstrated by several cases issued by the Tribunal, I believe that it has appropriately adopted a mild cultural relativist approach in its operations, and that it has endeavored, where appropriate, to recognize and take into account differences in the Rwandan culture when recognition of those differences has assisted the Tribunal to do justice.

1. Cultural and Language Factors Affecting Witness Testimony

Several ICTR decisions have noted the difficulty of receiving and interpreting testimony from witnesses whose culture and language is foreign to the Tribunal judges' own. The first case to discuss this issue was *The Prosecutor v. Akayesu*, in which the trial chamber found the former *Bourgmestre* (mayor) of Taba guilty of genocide, direct and public incitement to commit genocide, crimes against humanity, and sentenced him to life in prison.¹²⁷

In assessing the evidence against Mr. Akayesu, the trial chamber specifically considered "cultural factors which might affect an understanding of the evidence presented."¹²⁸ Some of these difficulties stemmed from the fact that most of the witnesses spoke Kinyarwanda, but this was not one of the Tribunal's official languages. For example, the trial chamber noted that there appeared to be contradictions between the testimony of several witnesses on the stand and earlier statements by these same witnesses given to Tribunal investigators.¹²⁹ The trial chamber explained these inconsistencies, in part, by noting that "the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the Tribunal [French and English] has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English."¹³⁰ These difficulties, the Tribunal reasoned,

127. See generally *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 638–744 (Sept. 2, 1998); Cecile E.M. Meijer, *The War Crimes Research Office Presents: News from the International Criminal Tribunal*, 9 NO. 3 HUM. RTS. BRIEF 30, 32 (2004).

128. *Akayesu*, ¶ 130.

129. *Id.* ¶ 140.

130. *Id.* ¶ 145.

affected the pre-trial interviews as well as the interpretation of in-court testimony.¹³¹

The trial chamber also noted that certain Kinyarwanda terms were infused with special meaning that could only be understood within the context of the Rwandan culture. For example, the basic meaning of the term *inyenzi* is "cockroach."¹³² However, the term had also been used to refer to the incursions of Tutsi refugees since the 1960s,¹³³ and it was later used by anti-Tutsi extremist media to refer to all Tutsis.¹³⁴ Similarly, the term *ibiyitso*, which literally means "accomplice," evolved in the early 1990s to refer to all Tutsis.¹³⁵

Moreover, taking such linguistic nuances into account may be relatively simple compared to the additional, broader cultural factors that the Tribunal found were also affecting witness testimony.¹³⁶ For example, the Tribunal received expert testimony that "most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often *irrespective of whether the facts were personally witnessed or recounted by someone else*."¹³⁷ Thus during the examination of certain witnesses, it was "at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed."¹³⁸ The expert witness explained that this was common in the Rwandan culture, but also that "the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen."¹³⁹ The trial chamber therefore "made a consistent effort to ensure that this distinction was drawn throughout the trial proceedings."¹⁴⁰

The Tribunal also received expert testimony that

it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is

131. *Id.* Although not mentioned by the Tribunal, Chuter also argues that "not every society expects ordinary people to volunteer evidence unless asked," and that the investigators may not have been thorough enough in their questioning to elicit full responses, responses which would later come out in the court room. CHUTER, *supra* note 22, at 157.

132. *Akayesu*, ¶ 148.

133. *Id.* ("Throughout the 1960's incursions on Rwandan soil were carried out by some of these refugees, who would enter and leave the country under the cover of the night, only rarely to be seen in the morning. This activity was likened to that of cockroaches, which are rarely seen during the day but often discovered at night, and accordingly these attackers were called *Inyenzi*.").

134. *Id.* ¶ 149.

135. *Id.* ¶ 150.

136. *Id.* ¶ 155-56.

137. *Akayesu*, Case No. ICTR-96-4-T, ¶ 155 (emphasis added).

138. *Id.*

139. *Id.*

140. *Id.*

delicate. In such cases, the answers given will very often have to be 'decoded' in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.¹⁴¹

The trial chamber noted specific instances of this in the proceedings. For example, several witnesses were reluctant or unwilling to state that the ordinary meaning of the term *inyenzi* was cockroach, although all Rwandans know the meaning of the word.¹⁴² More generally, the trial chamber also attributed to cultural constraints the "difficulty [of some witnesses] to be specific as to dates, times, distances and locations."¹⁴³

In light of these observations, the "Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions."¹⁴⁴ This is significant, as it acknowledges that in many cultures such reticence or circuitous testimony would affect a witness' credibility. Indeed, the judges' inclusion of this discussion in the opinion reflects the fact that the judges themselves would—in their home countries—likely have drawn a negative inference about these witnesses' credibility.¹⁴⁵ However, in this case, an insistence on the type of directness that the judges would normally associate with truthfulness might have led them to discount truthful testimony and reach an unjust result. The judges therefore correctly recognized that they must consider the cultural differences between themselves and the witnesses before them in adjudicating the case.

Similarly, in *The Prosecutor v. Rutaganda*, the trial chamber found Georges Rutaganda, second vice-president of the youth wing of the Interahamwe—the youth militia responsible for many of the killings—guilty of genocide and crimes against humanity and sentenced him to life in prison.¹⁴⁶ The trial chamber noted that it had:

taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these

141. *Id.* ¶ 156.

142. *Akayesu*, Case No. ICTR-96-4-T, ¶ 156.

143. *Id.*

144. *Id.*

145. The Trial Chamber consisted of Presiding Judge Laity Kama from Senegal, Judge Lennert Aspegren from Sweden, and Navanethem Pillay from South Africa. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentencing Decision (Oct. 2, 1999).

146. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence, ¶¶ 2, 11 (Dec. 6, 1999); see also Alexandra L. Wisotsky, *News from the International Criminal Tribunals*, 8 NO. 3 HUM. RTS. BRIEF 18 (2001).

witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc. These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles.¹⁴⁷

The trial chamber also noted “that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses’ testimonies was at times lost.”¹⁴⁸

On appeal¹⁴⁹ Rutaganda argued that the trial chamber committed an error of law “by improperly taking judicial notice of social and cultural factors.”¹⁵⁰ Rutaganda argued that “social and cultural factors are not ‘matters of common knowledge’ in respect of which judicial notice should be taken” under the ICTR Rules of Procedure and Evidence, and that the judges “made generalizations that were not corroborated by evidence or, especially, by expert opinion.”¹⁵¹ Thus, the defendant argued, “facts that were noted as being matters of common knowledge were in reality only matters of personal knowledge and stereotypes that the various members of the trial chamber may have had on the Rwandan people.”¹⁵² Rutaganda also criticized the trial chamber for applying the factors in a general way, without indicating the specific witnesses to which they applied.¹⁵³

The appeals chamber rejected the defendant’s argument. It held that the steps taken by the trial chamber could not be properly characterized as “judicial notice, the underlying purpose of which is to dispense with future proof of officially recorded facts that are indisputable.”¹⁵⁴ Instead, the appeals chamber reasoned that

the Trial Judgment only states an observation that obviously dawned on the Trial Chamber as it heard the evidence given before it, namely, the fact that some of the persons heard were farmers and people who

147. *Rutaganda*, Case No. ICTR-96-3, ¶ 23.

148. *Id.* For instance, Witness A testified at trial that he had four children who died in the genocide and one who survived. *Id.* In contrast, in a pre-trial statement he had stated that he had three children, all of whom had died. *Id.* The trial chamber concluded that this inconsistency was not material, and that it could be attributed to “difficulties of transcription and translation” relating to the pre-trial statements. *Id.* Thus the trial chamber did not draw any adverse inferences from these inconsistencies. See, e.g., *id.* ¶ 292.

149. See generally *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment (May 26, 2003).

150. *Id.* ¶¶ 12, 223.

151. *Id.* ¶ 223.

152. *Id.*

153. *Id.* ¶ 223.

154. *Rutaganda*, Case No. ICTR-96-3-A, ¶ 225.

were not sufficiently literate, and that this situation had repercussions on the quality of their evidence. . . .¹⁵⁵

The appeals chamber also rejected the contention that the trial chamber improperly took a general approach rather than indicating “in which cases and to what extent, in its assessment, it applied the test based on the impact of socio or cultural factors.”¹⁵⁶ The appeals chamber concluded that the trial chamber acted properly in setting out an introductory observation, and that it was not required to “articulate every step of its reasoning for each particular finding it makes.”¹⁵⁷ The appeals chamber also reasoned that the trial chamber had provided some specificity about the witnesses to whom its general observation applied, *i.e.*, “farmers and people who did not have a high standard of education. . . .”¹⁵⁸

The appeals chamber then used the example of Witness A, who “was born in a rural prefecture and lived in Rwanda all his life, spoke only Kinyarwanda, and was a mason by profession.”¹⁵⁹ When asked to estimate a distance in kilometers, the witness instead gave a distance based on his own visual assessment.¹⁶⁰ The witness also had difficulty giving directions in terms of north/south designations.¹⁶¹ The appeals chamber concluded that these difficulties “must be taken into account,” but that they “do not affect the testimony as a whole or its credibility.”¹⁶²

Thus, once again the Tribunal refused to hold the witnesses to a universal standard of credibility, *i.e.*, a standard that would conform more to the judge’s own cultural expectations. However, although the trial chamber probably should not be required to name each instance in which it considered cultural factors in evaluating testimony, it would nonetheless be better if the trial chamber did so in most cases. Only then can the appellate division, the defendants, the larger Rwandan community, and the international legal community truly evaluate whether these were appropriate exercises in cultural sensitivity, or whether at times the Tribunal may have seen cultural differences where they did not exist.

155. *Id.* ¶ 226.

156. *Id.* ¶ 228.

157. *Id.*

158. *Id.* ¶ 229.

159. *Rutaganda*, Case No. ICTR-96-3-A, ¶ 229.

160. *Id.* The witness stated: “I lived on the hill and the airport was located on a different hill. You can see the hill from us, as the crow flies, from our home.” *Id.*

161. *Id.*

162. *Id.* ¶ 230. Interestingly, the appeals chamber did not address the issue of the inconsistency with regard to the number of Witness A’s children; *see supra* text accompanying note 150. Presumably, either Rutaganda did not raise the issue on appeal, or the appeals chamber also accepted that the inconsistency was a translation or transcription error.

Specifically, Rwandans have an interest in ensuring that the Tribunal does not characterize any cultural differences in such a way that they are perceived as inferiorities. For example, it is unclear whether the lack of a witness' ability to give directions in north-south designations is truly due to cultural differences (e.g., this mode of direction is not used in some segments of Rwandan society) or was due to the fact that a particular individual was not educated. In fact, the appeals chamber appears to favor the later explanation, while also giving lip service to the notion of true cultural differences that can affect witness testimony.

Thus the trial chamber should endeavor in the future to be more specific about the particular witnesses to whom it applies these standards, and in relation to which part of their testimony. Nevertheless, the ICTR should be commended for recognizing the cultural issues that are raised by its work, rather than taking a radical universalist approach that could have interfered with its ability to do justice.

2. Genocide and the Definition of "Ethnicity"

Cultural differences may also affect the application of international legal concepts to specific fact situations. For example, the *Akayesu* decision reflected the first time that an international court found an individual guilty of genocide, but this was not a foregone conclusion as a matter of law. Article 2(2) of the ICTR's statute reflects, verbatim, the definition of genocide as contained in the Genocide Convention.¹⁶³ Genocide "means any of [a series of] acts . . . committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such," including, *inter alia*, "killing members of the group [or] causing serious bodily or mental harm to members of the group."¹⁶⁴ The trial chamber found as fact that the defendant engaged in these acts with the intent to destroy the Tutsi.¹⁶⁵ Yet, as described *supra*, it is debatable whether the Tutsis constituted a separate group, ethnic, racial, or otherwise, at the time of the massacre.¹⁶⁶

Nevertheless, the trial chamber recognized that "in the context of the period in question," the Tutsi and Hutu "were, in consonance with a distinction made by the colonizers, considered both by the authorities and themselves as

163. See Statute of the International Tribunal for Rwanda, *supra* note 105, art. 2; see also *Akayesu*, Case No. ICTR-96-4-T, ¶ 494.

164. *Akayesu*, ¶ 113; see also Statute of the International Tribunal for Rwanda, *supra* note 105, art. 2.

165. See *Akayesu*, ¶¶ 167-460.

166. *Id.* ¶ 122 n.56 ("[O]ne can hardly talk of ethnic groups as regards Hutu and Tutsi, given that they share the same language and culture.").

belonging to two distinct ethnic groups. . . .”¹⁶⁷ The trial chamber also noted that “in a patrilineal society like Rwanda, the child belongs to the father’s group of origin,” and that pregnant Hutu women were killed on the ground that Tutsi men fathered the fetuses they carried.¹⁶⁸ Thus, because the victims were not chosen as individuals or because they were RPF fighters, but rather due to their membership in the Tutsi ethnic group, the trial chamber concluded that genocide was committed “against the Tutsi as a group.”¹⁶⁹ The Tribunal thereby adopted “a strikingly modern definition of [an] ethnic group that accepts its constructed nature while acknowledging the power and potency of ethnic self-identification.”¹⁷⁰

Similarly, in *Rutaganda*, the trial chamber stated that there were currently no “internationally accepted precise definitions” of “the concepts of national, ethnical, racial, and religious groups,” and that therefore “[e]ach of these concepts must be assessed in light of a particular political, social and cultural context.”¹⁷¹ The court also held that, for purposes of applying the Genocide Convention, membership in a particular group is a subjective concept—the victim either perceives him/herself as belonging to a group and/or the perpetrator perceives the victim as belonging to the group slated for destruction.¹⁷² Thus the trial chamber held that “in assessing whether a particular group may be considered as protected from the crime of genocide, [we] will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political and cultural context. . . .”¹⁷³ The trial chamber also agreed with the *Akayesu* judgment that although the Tutsi population does not have its own language or a culture distinct from other Rwandans, “there were a number of objective indicators of the group as a group with a distinct identity.”¹⁷⁴ These included the identity cards that all Rwandans were required to carry, Rwandan laws in force prior to 1994 that identified Rwandans by reference to their ethnic group, and “customary rules . . . governing the determination of ethnic group, which followed patrilineal lines.”¹⁷⁵ Considering both these subjective and objective factors, the trial chamber concluded that the “identification of persons as belonging to the group of Hutu or Tutsi or Twa had thus become *embedded*

167. *Id.*

168. *Id.* ¶ 121.

169. *Id.* ¶ 126.

170. Alvarez, *supra* note 99, at 360.

171. *Rutaganda*, Case No. ICTR-96-3, ¶ 56.

172. *Id.*

173. *Id.* ¶ 58 (emphasis added).

174. *Id.* ¶ 374.

175. *Id.*

in Rwandan culture,” and concluded that the Tutsi qualified as a stable and permanent ethnic group under the Genocide Convention.¹⁷⁶

Thus in these cases the interpretation and implementation of a universal norm—the prohibition against genocide—was informed and assisted by a consideration of the specific cultural context in which a potential genocide occurred. Conceivably, the Tribunal could have adopted a rigid, radical universalist view that only ethnic groups as defined by objective western sociologists would meet the definition under the Genocide Convention. Instead, the Tribunal correctly recognized the fluidity of culture and context, and did justice to the real-world experience of the Rwandan Tutsis.¹⁷⁷

3. Sentencing Practices

As discussed *supra*, the lack of a death penalty option at the ICTR was one reason that the Rwandan government voted against the establishment of the Tribunal. Nevertheless, there are other aspects of the ICTR sentencing structure that are more sensitive to the Rwandan culture and judicial system. Specifically, Article 23 of the ICTR Statute states that “[t]he penalty imposed by the trial chamber shall be limited to imprisonment. In determining the terms of imprisonment, the trial chamber *shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.*”¹⁷⁸

This again reflects a form of mild cultural relativism, in this instance built into the ICTR Statute itself. Under this provision, two people, one in Rwanda and one in Yugoslavia, could commit the exact same act with the exact same *mens rea*, and both be found guilty of the same crime. However, if the sentencing practices in Rwanda (which presumably reflect Rwandan cultural preferences) were harsher than those of Yugoslavia,¹⁷⁹ the Rwandan defendant

176. *Rutaganda*, Case No. ICTR-96-3, ¶¶ 374–77 (emphasis added); *but see* CHUTER, *supra* note 22, at 84–88 (criticizing the ICTR’s finding of genocide as a political decision that ultimately weakens the legal definition of the crime); *see also id.* at 87 (“[i]n the period when the Genocide Convention was drafted . . . it was generally assumed that ‘nations’ were genetically different from each other. . . . [Also, at that time] ethnic groups were supposed to be primordial entities rigidly and permanently distinguished from each other. More recently, as the debates about ethnicity have grown more complex, it is becoming clear that it is a variable concept, constructed often by elites for their own benefit.”). Thus while Chuter argues, perhaps correctly, that “[t]his is not . . . what the ‘crime of crimes’ was supposed to be like [in the 1940s],” he concedes that he is describing the initial western race science conception of the crime. *Id.*

177. *Akayesu*, ¶ 557 n.130. Similarly, the ICTR held that with respect to the crime of direct and public incitement to commit genocide, the “direct element of incitement should be viewed in the light of its cultural and linguistic content. *Id.* Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience. . . . On this subject, see above, in the findings of the Chamber on Evidentiary Matters, the developments pertaining to the [expert] analysis of the Kinyarwanda language” *Id.*

178. Statute of the International Tribunal for Rwanda, *supra* note 105, art. 23 (emphasis added).

179. *See* The Secretary-General, *Report of the Secretary-General pursuant to Paragraph 2 of*

could receive a harsher sentence for the same act. This might seem unfair to the individual defendant, but a contrary result would arguably ignore the needs of Rwandan victims to see justice done in a way that accords with their cultural expectations.

A specific example of the ICTR's sentencing practice helps to illustrate the point. In *The Prosecutor v. Georges Ruggiu*, the accused, a Belgian journalist who moved to Rwanda and broadcast discriminatory and threatening remarks against the Tutsis and others on Rwandan radio, pled guilty to incitement to commit genocide.¹⁸⁰ During sentencing, the Tribunal noted Article 23's requirement that it take Rwandan sentencing practices into account.¹⁸¹ Under Rwandan domestic law, perpetrators of genocide or crimes against humanity are grouped into categories. Category one offenders are those who were "among planners, organizers, supervisors and leaders" of the genocide, persons who "acted in positions of authority," or "[n]otorious murderers" who "distinguished themselves" "by virtue of the zeal or excessive malice with which they committed atrocities."¹⁸² Category two offenders are those whose acts "place them among the perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death."¹⁸³ Under Rwandan law, the mandatory sentence for persons found guilty of category one offenses is the death penalty, and for persons in category two it is life imprisonment.¹⁸⁴ However, persons in category two or below can have their sentence reduced by entering a plea of guilty.¹⁸⁵

The Tribunal concluded that Ruggiu would most likely fall under category two in the Rwandan system. The trial chamber then noted that, under Rwandan law, those who pled guilty after prosecution for a category two offense receive twelve to fifteen years in prison.¹⁸⁶ The Tribunal also noted, however, that it was not required to conform to Rwandan sentencing practice, but was merely obliged to "take account" of that practice.¹⁸⁷ "[W]hile the Chamber will refer

Security Council Resolution 808 (1993), art. 24, delivered to the Security Council, Annex, Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993) (containing an identical provision to the governing statute for the ICTY requiring that in imposing sentence, that body "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.").

180. *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence (2000); see also Wisotsky, *supra* note 148.

181. See *Ruggiu*, ¶ 27.

182. *Id.* ¶ 28.

183. *Id.* Category three offenders are those guilty of "other serious assaults against the person," and category four offenses are those who "committed offenses against property." *Id.*

184. *Id.* ¶ 29.

185. *Id.* ¶ 30.

186. *Ruggiu*, Case No. ICTR-97-32-I ¶ 30.

187. *Id.* ¶ 31.

as much as practicable to the sentencing provisions under the [Rwandan] law, it will also exercise its unfettered discretion to determine sentences. . . ."¹⁸⁸

In considering the appropriate sentence for Mr. Ruggiu, the trial chamber noted that "[t]he accused is a European with a moderate level of education, who is inspired by a sense of justice."¹⁸⁹ The trial chamber also stated that

[d]efence counsel submitted that the accused was indoctrinated by a biased picture of the socio-political situation in Rwanda. The Chamber takes into account that the accused was not sufficiently knowledgeable to be able to make informed assessments of the situation . . . [T]he accused was a person of good character imbued with ideals before he became involved in the events in Rwanda.¹⁹⁰

The trial chamber then sentenced Ruggiu to two twelve-year sentences, to be served concurrently.¹⁹¹

The trial chamber was correct to conform Mr. Ruggiu's sentence to Rwandan sentencing practices. However, the chamber's references to Ruggiu's European background and seeming corruption by his visits to Rwanda are deeply troubling. This language implies that the chamber was more lenient with the defendant on the theory that, as a European, Mr. Ruggiu is the product of a more just culture.¹⁹² If true, this would be a gross mistake. Perhaps this is an example where one positive cultural relativist notion (Rwandan victims deserve sentencing consistent with their own cultural notions of justice) balanced a negative cultural relativist notion (Europeans are more just and less violent than Rwandans) to arrive at a sentence that, though light, was at least consistent with Rwanda's own sentencing practices.¹⁹³

V. LESSONS FOR THE FUTURE

At first glance, there would appear to be little room for cultural relativism with regard to war crimes. Indeed, in responding to a particular situation,

188. *Id.*

189. *Id.* ¶ 62.

190. *Id.* ¶¶ 63, 67.

191. See *Ruggiu*, Case No. ICTR-97-32-I, at Part IV.

192. The judges who issued this judgement and Sentence were Presiding Judge Navanethem Pillay of South Africa, Judge Erik Møse of Norway, and Judge Pavel Dolenc of Slovenia; see *Ruggiu*, Press Release, Int'l Criminal Tribunal for Rwanda, New Composition of Trial Chambers (June 7, 1999), available at <http://www.ictt.org/ENGLISH/PRESSREL/1999/188.htm>.

193. But cf. Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53 (2001) (evaluating the sentencing practices of the ICTR and ICTY and concluding that in general these bodies were not giving enough weight to Rwandan and Yugoslav sentencing practices).

international actors—particularly those from the West—should never ignore or minimize these crimes simply because they occurred in a culture dissimilar to our own. Thus claims for dissimilar treatment in war crimes prosecution on the basis of culture should be treated with caution, particularly with regards to Africa. The international community could easily hide its own neglect, or regime elites could hide their abuses, behind a veil of cultural sensitivity. Therefore, because the trend appears to be for the prosecution of war crimes by international tribunals, these tribunals should apply to persons of all cultures equally.

However, there is also room for caution. The establishment of the ICTR by the U.N. Security Council probably went too far in embracing universal values at the expense of the true needs of the Rwandan people. Specifically, certain aspects of the Tribunal's statute appeared to contradict Rwandan notions of justice. The absence of the death penalty, for example, raised the specter of moral imperialism, especially in light of the fact that those found guilty at Nuremberg were given the death penalty.¹⁹⁴ Generally, the establishment of the Tribunal over the opposition of the post-genocidal government will do very little to further the rule of law in Rwanda or to assist in building the capacity of the Rwandan judicial system.

As discussed *supra*, the ICTR has tried in its operations to strike a balance between universalism and cultural relativism concerns. Nevertheless, the Tribunal has not "made real contact with the populace affected by [its] proceedings. [It is] perceived as distant and unconcerned with the effect of [its] activities upon victims."¹⁹⁵ The very fact that the Tribunal is struggling with these difficulties should warn us against rushing to establish international tribunals that will apply international law without prior input from or knowledge about the affected culture. Judge Wald reached a similar conclusion with respect to the ICTY:

My experience with the inner workings of an international court suggests care. With careful self and public scrutiny, such courts can responsibly perform important adjudication and accountability functions that national courts in the thrall of leaders who are

194. See MORRIS & SCHARF, *supra* note 29, at 5. If the United Nations strongly believes that the imposition of the death penalty violates modern international norms of justice (or, put in cultural relativism terms, that the death penalty is not a cultural value or is not a value worthy of international recognition), then one possibility might have been to negotiate assistance that would have provided more long-term capacity building for the Rwandan judicial system in exchange for the abolition of the death penalty in Rwanda's domestic criminal law. *Id.* Of course, this solution would likely have met resistance from other members of the United Nations who continue to impose the death penalty in their own domestic systems. *Id.*

195. Wald, *Accountability for War Crimes*, *supra* note 32, at 192.

themselves alleged war criminals cannot. However, they should be reserved for just such extreme situations.¹⁹⁶

At the time the Tribunal was established, Rwanda was no longer governed by its previous genocidal government. Of course, Rwanda did need international assistance, and badly. Moreover, the presence of international judges and other legal personnel can have a beneficial effect on war crimes prosecutions. For example, "the presence of international judges can help to a) educate local judges on international law and minimal standards of fairness, b) create an impression of impartiality, and c) insulate local judges to some degree against intimidation from their own governments. . . ."¹⁹⁷ Thus international involvement in these situations can be useful and should not be completely rejected. Nonetheless, in the case of the ICTR, it would have been better to seek a compromise such that the Tribunal would have involved more participation by Rwandans and better consideration of Rwandan needs.

Hybrid courts, or courts which have aspects of both international and national courts, likely reflect the best balance between universalism and cultural relativism concerns in this respect.¹⁹⁸ Hybrid models have several advantages over pure international models. They are generally cheaper to establish and operate, and—key to the cultural relativism debate—they are "considered to be politically less divisive, more meaningful to victim populations, and more effective at rebuilding local justice systems."¹⁹⁹ In addition, because hybrid courts typically consist of both domestic and foreign judges, local judges may be able to explain relevant cultural norms to their international colleagues, thus lessening the need for costly and time consuming expert witness testimony and decreasing the chance of error in interpreting cultural norms.

For example, the hybrid special court for Sierra Leone is prosecuting those who allegedly committed war crimes in that country's civil war.²⁰⁰ The Sierra Leone Tribunal differs from the ICTR model in several respects:

196. Wald, *The International Criminal Tribunal*, *supra* note 47, at 117–18.

197. See Wald, *Accountability for War Crimes*, *supra* note 32, at 194.

198. See, e.g., Wald, *The International Criminal Tribunal*, *supra* note 47, at 118 ("[I] am happy to see the newer proposed U.N. tribunals relying more on tribunals located closer to the countries involved and composed in part, at least, of jurists from these countries.").

199. Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 246 (2003).

200. See S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000); see also Udombana, *supra* note 32, at 56; see generally Nancy Kaymar Stafford, *A Model War Crimes Court: Sierra Leone*, 10 ILSA J. INT'L & COMP. L. 117, 120 (2003) (estimating that between 100,000 and 200,000 people died during the ten-year civil war beginning in 1991).

- 1) It is based on a treaty between the U.N. and Sierra Leone, as opposed to the ICTY and ICTR which were established pursuant to the Security Council's Chapter VII powers;
- 2) The Special Court has the ability to consider not only violations of international humanitarian law, but also certain crimes under Sierra Leonean domestic law;
- 3) While it has primacy over domestic prosecutions in Sierra Leone, it lacks primacy over national courts of third party states; and
- 4) Most importantly for our purposes, "unlike the ICTY and ICTR; which are composed exclusively of international judges elected by the U.N. General Assembly and a Prosecutor selected by the Security Council, the Special Court is . . . composed of both international and Sierra Leonean judges, prosecutors, and staff.

.. .²⁰¹

More specifically, of the three judges who sit in each trial chamber of the special court, one is appointed by Sierra Leone and two are appointed by the U.N. Secretary General. Of the five judges who serve in the appeals chamber, two are appointed by the Government of Sierra Leone and three by the Secretary General.²⁰² The Sierra Leone government can, but is not required to, appoint judges from Sierra Leone.²⁰³ The Secretary General also appoints the prosecutor for a four-year term,²⁰⁴ who shall be independent from any government, but the deputy prosecutor must be a Sierra Leonean.²⁰⁵ The prosecutor may also have other Sierra Leonean or international staff.²⁰⁶ Thus the special court is more inclusive than the ICTR in several respects, thereby recognizing the value of participation by those most affected by the crimes under its jurisdiction.

201. Udombana, *supra* note 32, at 84; *see also* Stafford, *supra* note 202, at 126.

202. *See* Udombana, *supra* note 32, at 86; *see also* The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, Annex art. 2, *Agreement between the United Nations and the Government of Sierra Leone, delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4, 2000).

203. *See* Udombana, *supra* note 32, at 88 (noting that the Sierra Leonean government's first appointments consisted of one Sierra Leonean judge for the trial chamber, and one Sierra Leonean judge and one judge from the United Kingdom for the appeals chamber); *see also* Press Release, The Secretary-General, U.N., Appointments to Sierra Leone Special Court, U.N. Doc. SG/A/8/3 AFR/444 (July 26, 2002), available at <http://www.un.org/News/Press/docs/2002/sga813.doc.htm>.

204. *See* Udombana, *supra* note 32, at 90. (David Crane of the United States was appointed as the Special Court's first Prosecutor in May 2002.).

205. *Id.*

206. *Id.*

Another advantage of the Special Court is the fact that it is located in Sierra Leone.²⁰⁷ There are significant advantages to having the court on site: it gives the Court better and timelier access to witnesses and evidence, makes site visits possible without long delays in the trials, and may make victims and witnesses more comfortable when testifying.²⁰⁸ It can also help strengthen the legal system in Sierra Leone, by giving the government significant involvement in the establishment and administration of the court, as well as by leaving behind the actual physical structure of the court—no small matter in one of the poorest countries in the world.²⁰⁹ In addition, it will give the local population greater access to the court's proceedings, and allow local journalists to provide current updates in native languages.²¹⁰

Of course, a purely international tribunal could also be located within the country where the crimes occurred, so this is not an inherent advantage of hybrid courts over the ICTY/ICTR model. Nonetheless, the location of a court in the country of origin reflects an important improvement in terms of the universalism/cultural relativism debate; it allows the local population to accept the court as part of the local culture, and it helps to lessen the perception of outsider justice and moral imperialism while still involving the international community in the process. The inclusion of domestic crimes within the court's mandate should also be an advantage in this respect, as these laws may reflect local culture more directly and fully than do purely international norms.

Of course, hybrid courts are not a panacea for all of the problems inherent in war crimes prosecutions. Because of the participation of international judges, hybrid courts will inevitably have the same language and translation difficulties that plague any international tribunal.²¹¹ In addition, since hybrid courts are more likely to apply a mixture of international and national law, they will need to interpret domestic law correctly—a task with which the ICTR has apparently had some difficulty.²¹² Of course, the risk of error should be lessened by the presence of at least some judges from the affected country on the court, but these judges may have to take extra care monitoring the work of their international colleagues.

It could also be argued that the inclusion of local judges on hybrid courts will make the proceedings more biased (either in favor of or against the defendants) and thus less likely to achieve legitimacy with the local or

207. *Id.* at 128.

208. *Id.*

209. Udombana, *supra* note 32, at 128.

210. *Id.*

211. See, e.g., Tom Briody, *Defending War Crimes in Africa: The Special Court for Sierra Leone*, CHAMPION, Jan. – Feb. 2005 at 34. Cf. CHUTER, *supra*, note 22, at 207, 217.

212. See, e.g., Morris, *Rwandan Justice*, *supra* note 128, at 352–53.

international communities.²¹³ Or, put in the context of the cultural relativism debate, the inclusion of local judges could further (or be perceived as furthering) negative aspects of the local culture. This argument might have extra force where, as in Rwanda, local judges would almost inevitably be a member of one of the disputing racial or ethnic groups. However, this problem would also be inherent in any domestic tribunal, and thus the presence of international judges on hybrid courts should reduce any perceived or real bias. Perhaps this is also a good reason to have a majority of the judges come from or be appointed by third countries, as is the case with the special court for Sierra Leone.

Hybrid courts have also suffered from funding difficulties, *e.g.*, the Sierra Leone Special Court was to be funded by voluntary contributions, a problematic approach that can lead to serious budget shortfalls.²¹⁴ However, this is not a problem inherent in the hybrid system, and the ICTR and ICTY have also had funding struggles. Rather, it reflects that fact that any court, in order to be successful, must be given the resources it needs to fulfill its mandate. The funding problem does, however, reflect the fact that more needs to be done to convince the international community of the advantages of the hybrid system. Although it may not look as inherently international as some tribunals (and thus the international community may be more tempted to say "it's not our concern")—in reality the hybrid model reflects a wise compromise between the international and domestic systems, and is probably a better way for the international community to spend its money.

The existence of the ICC does not moot the issue. Although the ICC will, undoubtedly, be an important factor in war crimes prosecutions, due to various factors (especially the resistance of the United States to the court) it appears unlikely that it will become the sole international body to prosecute war crimes in the foreseeable future.²¹⁵ Thus hybrid tribunals may have an important

213. See Stafford, *supra* note 202, at 140.

214. See *e.g.*, *id.* at 138–39.

215. In this regard, the United States took a very positive step when it did not veto the Security Council's referral of war crimes committed in Darfur, Sudan to the ICC. See Press Release, Security Council, U.N. Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/SC8351.doc.htm>; see generally S.C. Res. 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005). However, it is unlikely that this signals a major U.S. policy change toward the ICC. Not only has the U.S. government declared its intention never to become a party to the ICC Statute, it has also taken various measures to weaken the court. See Letter from John R. Bolton, Under Sec'y of State for Arms Control and Int'l Security, U.S. Dep't of State, to Gen. Kofi Annan, Sec'y Gen., U.N. (May 6, 2002) (on file with the U.S. Dep't of State), available at <http://www.state.gov/t/pa/prs/ps/2002/9968.htm>. These measures have included:

- 1) Pursuing bilateral "Article 98" agreements—which prevent the surrender of any American to the ICC—all over the world;
- 2) Enacting the American Servicemembers Protection Act, which, *inter alia*,

role to play, and should be considered in any instance where the ICC can not or does not assume jurisdiction over international crimes.

Nevertheless, the ICC will likely be a major force in the future of war crimes punishments, and it should be aware of universalism/cultural relativism issues as it pursues its mandate. As a pure international court, the ICC may inherently tilt too far toward radical universalism ideas, as with the ICTR.²¹⁶ However, because it is a treaty body, at some point the affected local government (or the government of the defendant) will have agreed to its jurisdiction, thus, hopefully, representing some consent by the local culture.²¹⁷ In addition, unlike the ICTR, which can require any national court to relinquish jurisdiction over a defendant under its mandate,²¹⁸ the Rome Statute provides that cases will be admissible only if national justice systems are “unwilling or unable genuinely” to investigate or prosecute.²¹⁹ In terms of the universalism/cultural

largely prohibits any U.S. court or agency from cooperating with the ICC and requires the United States to cut off military assistance to ICC members who have not signed an Article 98 agreement;

- 3) Enacting—as part of the 2005 Consolidated Appropriations Act—the “Nethercutt Amendment,” which prohibits peacekeeping and democracy-building assistance to any country that is a party to the ICC but has not signed an Article 98 Agreement; and
- 4) Blocking Security Council peacekeeping action until receiving assurances that the ICC would not investigate or seek custody over peacekeepers from non-state parties.

See American Servicemembers Protection Act, 22 U.S.C. §§ 7401-7433 (2005) (restricting U.S. accession to the ICC); Consolidated Appropriations Act of 2005, Pub.L. No. 108-447, §574, 118 Stat. 2809, 3027-28 (2004) (limiting economic support to foreign governments that are a party to the ICC); S.C. Res. 1497, ¶ 7, U.N. Doc. S/RES/1497 (Aug. 1, 2003) (delaying peacekeeping mission in Liberia until the United States received a permanent exemption from ICC jurisdiction for non-state parties); S.C. Res. 1502, U.N. Doc. S/RES/1502 (Aug. 26, 2003) (refusing to support a resolution condemning violence against humanitarian aid workers in Iraq and elsewhere until references to the criminalization of these acts in the ICC Statute were removed); Philip T. Reeker, Spokesman, U.S. Dep’t of State, Daily Press Briefing (Aug. 25, 2003), available at <http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0308d&l=dosbrief&D=1&O=D&F=&S=&P=255>; Press Release, Ambassador Richard S. Williamson, Alternative Rep. to the U.N. for Special Political

Affairs, Remarks at U.N. Headquarters on the Situation in Bosnia and Herzegovina (June 19, 2002) (on file with the U.S. Mission to the U.N.), available at http://www.un.int/usa/02_081.htm. (opposing the extension of the U.N. mandate in Bosnia unless international peacekeepers were given immunity from ICC prosecution); The American Non-Governmental Org. Coal. for the Int’l Criminal Court, *Bilateral Immunity Agreements* (2002), http://www.amicc.org/usinfo/administration_policy_BIAs.html#recent (noting 92 Article 98 agreements signed as of July 13, 2004).

216. Note, for example, that unlike the ad hoc tribunals, the ICC is not required to take local sentencing practices into account. See Drumbl, *Collective Violence and Individual Punishment*, *supra* note 41, at 598.

217. See Rome Statute, *supra* note 33, art. 12.

218. See Morris, *Rwandan Justice*, *supra* note 128, at 354.

219. See Rome Statute, *supra* note 33, art. 17.

relativism debate, this is an improvement, and should allow the court to avoid many of the pitfalls that other international tribunals have encountered. Most importantly, it gives the country affected the chance to implement justice according to local customs and norms, yet it still gives the ICC the opportunity to assume jurisdiction if the local efforts are nonexistent or merely sham proceedings.

Finally, the ICC can strike the proper balance between universalism and cultural relativism concerns by “working with local governments to get their systems in shape rather than merely fighting off their efforts to resist ICC jurisdiction.”²²⁰ The ICC can also work in conjunction with hybrid tribunals—at least one scholar has proposed the establishment of joint initiatives between the ICC and national or hybrid courts.²²¹ Finally, where it does assume jurisdiction, the ICC can and should follow the lead of the ICTR in recognizing and taking into account cultural differences when they arise.

VI. CONCLUSION

In conclusion, judges and others involved in international war crimes prosecutions must be aware of the dangers of both radical universalism and radical cultural relativism. They should attempt to strike a balance that will recognize legitimate cultural differences—particularly when those differences may make it more difficult to uncover the truth about what occurred—but without ignoring the danger of using cultural relativism as a shield behind which to hide atrocities. A mild cultural relativism approach is the best way to accomplish these goals. This approach applauds the involvement of the international community in war crimes prosecutions, regardless of the identity of the victims. However, this approach also recognizes the value of cultural sensitivity and encourages the international community to understand and work with the culture of those whom it seeks to judge. The best balance can be struck by establishing hybrid tribunals and/or by international tribunals exercising jurisdiction only where the domestic courts are unable or unwilling to do so. By following this approach, the international community can further the cause of universal justice without alienating the very people it is designed to serve.

220. Wald, *Accountability for War Crimes*, *supra* note 32, at 194.

221. See Stafford, *supra* note 202, at 137–38.

DEMYTHOLOGIZING RESTORATIVE JUSTICE: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION AND RWANDA'S GACACA COURTS IN CONTEXT

*Olivia Lin**

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I. INTRODUCTION

Since the Allied-overseen Nuremberg Trials in 1945, the legal measures pursued by nations negotiating political transition and responding to the human rights abuses of prior regimes (“transitional justice”)¹ are subject to examination by the watchful eye of the international community and international standards.² Despite the development of a “universalizing” rule of law, the subsequent interplay of internationalist and nationalist responses to transition reveal a continuing tension between the Nuremberg model of retribution and appeals for

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1. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

2. See *id.* at 73 (“The period immediately following World War II was the heyday of international justice. The critical turn away from the prior nationalist transitional responses and toward an internationalist policy was thought to guarantee rule of law.”).

amnesty.³ Lately, as nations have sought a middle ground between retributive justice and a "comprehensive policy of official amnesia,"⁴ truth commissions have emerged as an increasingly popular model of restorative justice in times of transition.⁵ Whether confronting human rights abuses committed during liberation conflicts⁶ or resulting from prior military regimes,⁷ the primary motif of truth commissions is to narrate individual stories and acknowledge abuses within the framework of a "jurisprudence of forgiveness and reconciliation"⁸ that abstracts discrete, local events into universally applicable themes.⁹

Of these truth commissions, the chief model capturing the imagination of the global community is South Africa's Truth and Reconciliation Commission (TRC).¹⁰ The lion's share of the scholarship that exists concerning South Africa's TRC revolves around its value as a form of restorative justice that

3. See *id.* at 76 ("The profound and permanent significance of the Nuremberg model is that by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed. Whereas the [post-Nuremberg jurisprudence] simply assumed the legitimacy of punishing human rights abuses, [in later years,] the tension between punishment and amnesty was complicated by the recognition of dilemmas inherent in periods of political flux.").

4. John P. McCormick, Book Review, 25 N.Y.U. REV. L. & SOC. CHANGE 109, 111 (1999) (reviewing David Dyzenhaus, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998)).

5. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 436 n.509 (2002) ("[T]ruth commissions have been established in countries including Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, the Philippines, Rwanda, Somalia, South Africa, Uganda, and Uruguay."); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 76-77 ("Because truth commissions eschew both criminal prosecution on the one hand and blanket amnesty on the other, they are often referred to as a 'middle path' or 'third course' or 'golden mean.'"); Carrie J. Niebur Eisnagle, Note, *An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209, 224 (2003) ("Since [Argentina's creation of a truth commission after its defeat in the Falkland Islands war,] more than 20 truth commissions have existed around the world in the past 20 years.").

6. See Daly, *supra* note 5, at 77 ("[T]he Truth and Reconciliation Commission (TRC) was carefully designed to attend to the particular ills that characterized South Africa at the end of the apartheid era.").

7. See John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 288 (1998) ("The truth commission for Argentina/the National Commission for the Disappeared/was set up by President Raul Alfonsin in 1983 after the fall of the military junta and was able to carry out thorough investigations into torture and disappearances.").

8. Teitel, *supra* note 1, at 81.

9. See *id.* at 81-82 ("The truth and reconciliation project incorporated much of its normative discourse from outside the law, specifically from ethics, medicine, and theology . . . Both political activism and scholarship sought to move outside contemporary politics and history to represent conflict in timeless and universal terms.") (emphasis added).

10. See Daly, *supra* note 5, at 77 ("While there have been truth commissions in the past, none has been as successful or has garnered as much international attention as South Africa's."); *id.* at 112 ("[T]he international response to the TRC suggests that it, more than any other recent experiment in transitional justice, is the *beacon* to which other emerging nations are looking.") (emphasis added).

emphasizes ideological virtues *du jour* such as reconciliation,¹¹ communitarian values,¹² or confession.¹³ In overwhelming measure, these reports rely on this significant baseline assumption: South Africa's TRC was a success.¹⁴ This article proposes that a critical gap¹⁵ exists between the ideological weight that the TRC carries within the international community and the political realities initiating and controlling the TRC's development.

In establishing a productive critique of South Africa's experience with the TRC, this article seeks to penetrate past pure ideology to ask whether, in fact, South Africa's story is a wholly successful one, and to question the merit of its development into an international metanarrative. Through a more critical lens with which to view the TRC and truth commissions in general, it becomes possible to properly review the situation of other nations, such as Rwanda, who are attempting to borrow pages from South Africa's now-universalized narrative. Truth commissions may be the cinderella of international law's transitional justice models, but demythologizing the responses to civil conflict and ethnic unrest in Africa requires a look at the political realities that informed each country's choice to move toward restorative or punitive justice.¹⁶

11. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1268 (2000) ("National reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past.") (citation omitted).

12. *Id.* at 1270 (describing how truth commissions may respond to mass human rights violations by "offering individual therapy, solidarity with other survivors, a dramaturgical recovery system, and, in the end, group catharsis") (citation omitted).

13. See Teitel, *supra* note 1, at 83 (suggesting that truth commissions created a "move from the courtroom to the hearing room and [a] turn to discursive confessional testimonials" which "tended to eschew judgment and instead aimed to move beyond legal notions of guilt and responsibility").

14. See, e.g., Daly, *supra* note 5, at 112 ("[T]he TRC . . . demonstrate[d] that values other than retributive justice can and should be promoted during times of transition . . . However, the TRC's success in South Africa does nothing to predict the success of other TRCs elsewhere."); Drumbl, *supra* note 11, at 1268 ("Although certainly not without its criticisms and controversies, the overall evaluation of the TRC has been a positive one"); Donald W. Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 16 (2001) ("One of the great services of the South African TRC to the formation of a new national political culture was its back-and-forth dialogue between victims and perpetrators. . . ."); Eisnagle, *supra* note 5, at 224 ("Out of all the truth commissions that have operated since the surge began, South Africa's TRC has emerged as the best example of restorative justice ideals and practices on a national level.").

15. See Teitel, *supra* note 1, at 85 ("Existing scholarship has not yet captured the prevailing dynamic of transitional justice or its nexus with ongoing political change.").

16. See Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 CARDOZO J. INT'L & COMP. L. 89, 95 (2003) ("[T]here is no guarantee that what worked in one country will be appropriate in another country with dramatically different social, political and cultural assumptions.").

In Part I, this article outlines the background to South Africa's TRC, and subsequently critiques the prevailing international perspective on South Africa as a successful model of the restorative justice ideology. By contrast, this article argues that the animating principles for the Commission were *political*, rather than ideological. Part II provides a brief outline of the TRCs structure, and subsequently develops an intellectual history for the birth of the TRC as a restorative justice metanarrative. Here, the discussion seeks to illustrate how the reconciliation myth at the heart of the South African experience is precisely that—a myth that resonates for a newly globalized community that is increasingly responsive in a *categorical* way to restorative justice. In analytical partnership with Part II, Part III examines the fundamental premises of truth commissions, and in particular, the usefulness of past-oriented, confessional methods of response to political transition. In particular, this portion of the article engages with the most recent sociological scholarship and legal theory to militate against the notion of revisiting the past as an ideological end and a productive means of transitional justice. Finally, Part IV examines the current situation in post-genocide Rwanda as a relevant case study. After providing background to the human rights abuses in Rwanda, this article examines Rwanda's present attempt at developing a Gacaca court system from the rehabilitated critical lens of the South African experience.

II. CRITIQUING THE METANARRATIVE

A. Apartheid and Background to South Africa's TRC

A contextual understanding of South Africa's TRC requires a close examination of the definitive features of apartheid, a policy of "racial separateness" that broadly distinguished "whites" ("Europeans") from "non-whites" ("non-Europeans"), with the latter category encompassing the racial labels of "African" (black), "colored," and "Indian."¹⁷ Unlike human rights abuses in other countries or generations, apartheid was "a system of oppression that was defined by law."¹⁸ The underlying push of apartheid was not the result of a mob culture, unsupported by dominant governmental entities. Rather, with the election victory of D.F. Malan and the Nationalist Party in 1948,¹⁹ South Africa's primary civil structures began to serve as a buttress for human rights abuses.²⁰

17. RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 4 (2000).

18. Daly, *supra* note 5, at 113.

19. SPITZ & CHASKALSON, *supra* note 17.

20. See Daly, *supra* note 5, at 114 ("A strong legal framework, including all branches of government, succeeding constitutions, and a vast array of laws duly passed by Parliament, supported this

Ultimately, under the parliamentary sovereignty that typified the apartheid era, members who were unrepresentative of the non-white majority²¹ could exercise essentially unlimited power to enact laws which generated profoundly oppressive measures against South African blacks.²²

The political roots of apartheid have a deep historical reach, and for that reason, understanding the development of the TRC requires examining how oppressive ideals reified through the passage of time. During the period of British occupation of South African territory in the early nineteenth century, policies of separation became pervasive: blacks were segregated in their living environments, places of employment, and education; political participation by the black majority was forbidden or stymied by the white minority in power; property ownership was largely only a possibility for whites.²³ Moreover, when the country's first parliament formed in 1910, enacted legislation continued to reinforce the policy of inequity, including the passage of the Natives Land Act of 1913, which precluded blacks from land transactions and paved the way toward both political and practical dispossession of the black majority.²⁴

Although South Africa's early colonial period nurtured a culture of racial inequity, apartheid came to a head in legislative terms after the Nationalist Party (NP) gained power in the mid-twentieth century.²⁵ In a single decade (1950–1959), laws were enacted to register every South African as a member of a specific racial group,²⁶ force black Africans to carry passes,²⁷ restrict the

system of oppression.”). However, while apartheid was not a haphazard system of government, its execution was not without difficulty. *Id.* See KENNETH CHRISTIE, *THE SOUTH AFRICAN TRUTH COMMISSION* 21 (2000) (“[Apartheid] was a policy which saw many internal struggles and contradictions; it was revised over and over again and these uncertainties, conflicts, failures and deviations, although often less visible than the continuities and triumphs of Apartheid, were fundamental to its development.”).

21. Daly, *supra* note 5, at 114.

22. See *id.* (observing that these legislated oppressions included: racial registration laws, segregation laws, dispossession laws, removal laws, pass laws, suppression of expression and assembly laws, detention laws, disenfranchisement laws, dis-employment laws, dis-education laws, anti-miscegenation laws, and anti-injunction laws).

23. Cassandra Fox Charles, *Truth v. Justice: Promoting the Rule of Law in Post-Apartheid South Africa*, 5 ST. MARY'S L. REV. ON MINORITY ISSUES 81, 85 (2002).

24. *Id.*; see CHRISTIE, *supra* note 20, at 12 (“[The] Land Act of 1913 . . . limited black ownership to 13 per cent of the country.”).

25. See SPITZ & CHASKALSON, *supra* note 17, at 4 (“The National Party government’s objective was to make South Africa a country run by whites for whites only, and particularly for those of Afrikaner descent. Its intentions, as well as the extent to which it sought to reserve the power of enforcement to the executive, were quickly laid bare by its enactment of a series of laws.”).

26. See *id.* (“The Population Registration Act of 1950 provided for the compilation of a register of the entire population, designed to allocate every person in South Africa to a particular racial group.”).

27. See *id.* (“[The Abolition of Passes and Coordination of Documents Act of 1952,] contrary to the apparent meaning of its title, required all black Africans to carry detailed ‘reference books’, commonly known as ‘passes’.”).

right of black Africans to live in white urban areas,²⁸ create separate political and educational structures,²⁹ establish racially exclusive residential locations,³⁰ and prevent non-white South Africans from voting.³¹ Moreover, not only did the National Party enact legislation to perpetuate apartheid, they also worked to prevent opposition to the new legal measures.³² For example, the Internal Security Act of 1950 prohibited listed individuals and organizations from promoting "ideologies and activities opposed to white domination or apartheid."³³ The likeminded Criminal Law Amendment Act of 1953 punished civil disobedience with a three-year prison sentence.³⁴ These and similar enactments stymied the possibility of effective opposition by the African National Congress (ANC) and other organizations critical of the apartheid legislation.³⁵

Through the next thirty years, the political tension surrounding the issue of apartheid increased steadily as the Nationalist Party sought to suppress an increasingly violent reaction against apartheid, buttressed separatist policies, and initiated only cosmetic reforms (which were largely enacted for economic reasons).³⁶ In particular, when H. F. Verwoerd served as the Prime Minister of South Africa from 1958 to 1966, the tenor of apartheid resistance shifted toward violence.³⁷ After the police shot and killed sixty-nine people and wounded 180 others during what was intended to be a peaceful protest in March 1960 at Sharpeville (the "Sharpeville massacre"), both the African National Congress and the Pan Africanist Congress moved their organizations underground³⁸ and

28. See *id.* ("Section 10 of the Black (Native) Laws Amendment Act of 1952 restricted the right of blacks to live in the white urban areas to those who had been born there, those who had lived there continuously for fifteen years, and those who had worked continuously for the same employer for ten years.").

29. *Id.* ("[The Nationalist Party tried] to resuscitate tribal forms of political authority in the 'reserves' . . . in the hope that black political and other aspirations could be accommodated there. Meanwhile the Bantu Education Act of 1953, which transferred the responsibility for the administration of black education to the Department of Native Affairs, initiated the establishment of separate education systems for whites and blacks. . .").

30. See SPITZ & CHASKALSON, *supra* note 17, at 4-5 ("The Group Areas Act of 1950 provided that areas not already set aside for blacks could be made racially exclusive—with the adverse impact borne by coloreds and Indians, who were forced to live in wretched and overcrowded locations.").

31. See *id.* at 5 ("In 1956 the government disenfranchised coloreds in the Cape, thereby removing the last vestige of non-white political participation.").

32. *Id.*

33. *Id.*

34. *Id.*

35. SPITZ & CHASKALSON, *supra* note 17, at 5.

36. See *id.* at 9 ("The Nationalists came to recognize the economy's dependence on black labor, and began a course of limited reforms designed to bring black workers into the state's economic infrastructure.").

37. *Id.* at 6.

38. *Id.* Both organizations were banned by the government under the Unlawful Organizations Act of 1960. *Id.* at 7.

created military wings.³⁹ For many moderates, the 1960s ushered in a forcible awareness that non-violent resistance may have gained the movement international sympathy, but little substantive change.⁴⁰

Although hostility between the two camps increased throughout the 1970s, the Nationalist government successfully thwarted any active form of armed rebellion through a series of authoritarian measures geared to sustain the apartheid regime.⁴¹ Under Verwoerd, the ideological voice behind the apartheid state, the homeland system was created, which further reified racial segregation.⁴² The homeland process forced millions of blacks to exchange their South African citizenship for citizenship specific to a homeland.⁴³ In creating homelands in the reserves, the government hoped to “absorb ‘economically superfluous’ blacks” while allowing economically “‘useful’” blacks to remain in the cities (although often in poverty).⁴⁴

The development of the homeland system accentuated an intensifying rift between those who were otherwise united against apartheid. In particular, the liberation movement was divided with regard to whether dialogue with the ruling civil power structures was necessary or productive.⁴⁵ While Chief Mangosuthu Buthelezi of the KwaZulu territory argued that participation in the national political structures could prevent black homelands from being cast aside with an unwanted independence and blacks from being stripped of their South African citizenship, the ANC criticized his stance, arguing that Buthelezi’s Inkatha movement merely supported the political fiction of a productive yet separate development.⁴⁶ The rift within the resistance movement diverged most notably after the Soweto Uprising in June 1976.⁴⁷ Largely the product of a reaction against the mandate of Afrikaans as the language for state education in black schools, a dramatically unsuccessful rebellion occurred in which hundreds of protesters were killed and thousands injured or exiled.⁴⁸ In

39. SPITZ & CHASKALSON, *supra* note 17, at 7.

40. *Id.*

41. CHRISTIE, *supra* note 20, at 27 (“[B]y the mid 1970s the armed struggle in South Africa had to all intents and purposes ground to a halt. Little was seen or heard of the ANC during this period.”).

42. SPITZ & CHASKALSON, *supra* note 17.

43. *Id.*

44. *Id.* (quoting an unnamed source).

45. *See id.* at 8 (“Several of the homelands, though slow to release themselves from Pretoria’s shackles, became progressively less subservient to the South African government and more interested in bringing about an end to the apartheid system to which they owed their status. Others attempted to prop up the system and their role in it.”).

46. *Id.*

47. *See* SPITZ & CHASKALSON, *supra* note 17, at 8–9.

48. *Id.* at 8.

the wake of the uprising, the resistance movement found itself at an internal crossroads: while Buthelezi believed that black lives were needlessly wasted in the attempt, the ANC emerged adamant to engage in a resuscitated armed struggle.⁴⁹ Indeed, until and throughout the formal negotiations between the resistance leaders and the South African government in 1990, Nelson Mandela, the deputy president of the ANC, affirmed that armed struggle was a legitimate form of self-defense when confronted with morally repugnant government structures.⁵⁰ The division within the resistance merely underscores the complexity of South Africa's political terrain during the grand apartheid years.

In the final decade of apartheid, although the Nationalist government enacted a series of superficial reforms in response to a growing realization of South Africa's economic dependence on the black population,⁵¹ those measures could not conceal the increasingly apparent failures of the separatist system. Acknowledging that South Africa had to "adapt or die," P.W. Botha inaugurated policies from the late 1970s into the 1980s that purported to encourage "a united South Africa, with one citizenship and a universal franchise,"⁵² but the developed measures merely perpetuated the existing system. For example, although the 1983 Constitution created a tricameral Parliament with distinct chambers for coloreds and Indians, these chambers remained subordinate to the largely white President's Council.⁵³ Likewise, although some of the most egregious apartheid measures were repealed, including prohibitions on mixed marriages and segregation on public transportation, the ruling minority still denied the black majority the opportunity for full rights.⁵⁴

49. *Id.* at 8-9.

50. See Peter N. Bouckaert, Note, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375, 386 (1997) ("I am in prison as the representative of the people and your organization, the African National Congress, which was banned. What freedom am I being offered while the organization of the people remains banned? . . . Only free men can negotiate. Prisoners cannot enter into contracts.") cited in SHERIDAN JOHNS & R. HUNT DAVIS, MANDELA, TAMBO, AND THE AFRICAN NATIONAL CONGRESS: THE STRUGGLE AGAINST APARTHEID 1948-1990 at 215 (1991).

51. See SPITZ & CHASKALSON, *supra* note 17, at 9 ("The Nationalists came to recognize the economy's dependence on black labor, and began a course of limited reforms designed to bring black workers into the state's economic infrastructure. Yet they never considered granting full political rights to blacks.")

52. *Id.*

53. *Id.*

54. *Id.* at 10.

The South Africa of 1985–1990 was in a perpetual state of emergency.⁵⁵ Politically, the constitutional structure of South Africa and the demands of popular will were at odds.⁵⁶ Less than 20 percent of South Africa's population could engage in the democratic political game, and a robust form of judicial review was consistently rejected by the ruling party in South Africa throughout the twentieth century.⁵⁷ Indeed, the concept of a bill of rights as a component of a new constitutional order was anathema to an *Afrikaanerdom* tradition which gave priority to the State over the interests of the individual.⁵⁸ The legacy of apartheid was not merely a government-enforced racism or segregated civil power structures. In the socio-economic sphere, apartheid's repercussions were devastating: income inequality in South Africa had reached catastrophic heights, with the white minority (approximately 15 percent of the population) earning on average eight times the income of the black majority (approximately 75 percent of the population); the top 5 percent of the population consumed more than the bottom 85 percent; four white conglomerates held 87 percent of the land and 95 percent of South Africa's productive capital.⁵⁹

In light of the incontrovertible problems South Africa was facing, when F.W. de Klerk replaced Botha as the National Party Leader and State President in August 1989, a period of "cautiously reformist policy"⁶⁰ transitioned quickly into a period pregnant with the possibility of more radical reform measures.⁶¹ Although many were surprised by De Klerk's responsiveness to systemic changes,⁶² his willingness to dialogue with the resistance leaders—represented

55. See *id.* at 11 ("In July 1985 President Botha declared a nationwide state of emergency which gave the government even greater powers and discretion to implement detention without trial, to break up the smallest gatherings, and generally to suppress political activity. The state of emergency was renewed each June until 1990.").

56. Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 135 (2000) ("Prior to the enactment of the 1993 interim Bill of Rights . . . there was perhaps no other country in the postwar world in which the gap between popular will and constitutional arrangements was quite so wide.").

57. SPITZ & CHASKALSON, *supra* note 17, at 11.

58. *Id.*

59. Hirschl, *supra* note 56, at 136.

60. SPITZ & CHASKALSON, *supra* note 17, at 13.

61. In part, the NP's willingness to entertain more radical reform was due to a withdrawal of support from dominant global players such as the United States. During the Cold War era, South Africa garnered international support by "characterizing its struggle with the liberation forces as a fight against communism." See Bouckaert, *supra* note 50, at 378. With the Soviet Union's collapse, the semiotic worth of South Africa in stymieing communism diminished. See *id.* ("Stripped of its anticommunist cloak, the South African government was exposed as an anomalous minority regime which brutally oppressed its majority African population.").

62. See SPITZ & CHASKALSON, *supra* note 17, at 13 ("Many observers were surprised, having thought De Klerk to be conservative and suddenly finding him to be more radical than they had believed.").

by his willingness to release Mandela and other prominent ANC and South African Communist Party (SACP) leaders and enter into negotiations with them—illustrated the diversity of opinion within the National Party.⁶³ This diversity was even more apparent in National Party members such as Roelf Meyer, Leon Wessels, and Dawie de Villiers, whose leftist positions were integral to the subsequent dialogues.⁶⁴ As a result of the new leadership, the mentality toward negotiations shifted. In a watershed speech during the opening of Parliament on February 2, 1990, De Klerk declared: “[O]nly a negotiated understanding among the representative leaders of the entire population is able to ensure lasting peace.”⁶⁵ With a changing of the guard, new leadership realized the need for a new platform for negotiation.

B. The TRC as a Political Settlement

Effectively at a deadlock in 1990, both the National Party (NP) and the African National Congress realized that some form of political settlement could not be avoided.⁶⁶ While the NP perceived a political re-ordering as the only means of resuscitating a failing economy, the ANC viewed a settlement as a requisite move toward dismantling white hegemony.⁶⁷ The backdrop for these negotiations was a series of dramatic reforms announced by De Klerk during his momentous February 2, 1990 address to Parliament: the legalization of several black liberation organizations (including Umkhonto) and the SACP, the release of political prisoners (including the unconditional release of Mandela), and the promise to develop a new, democratic national constitution through dialogue between the NP and the newly-legalized organizations.⁶⁸ In the Pretoria Minute of August 7, 1990, the ANC formally suspended armed struggle, committed to the negotiating table, and affirmed the bilateral commitment characterizing the negotiations.⁶⁹ The violence between the ANC and the Inkatha Freedom Party

63. See *id.* at 14 (“[F]actional differences within the governing party were reflected in generational differences. Many of the party’s ‘elder statesmen’, including Botha, were reactionaries. Their rise within the NP paralleled the evolution of apartheid from 1948. For Botha to have started major changes would have amounted to a repudiation of his political heritage.”).

64. Roelf Meyer in particular established important links between the National Party and the ANC; see *id.* at 13 (“[Meyer’s] constant line of communication with the ANC’s Cyril Rampahosa—the Meyer-Ramaphosa ‘channel’—became an indispensable feature of the negotiated transition.”).

65. SPITZ & CHASKALSON, *supra* note 17, at 15 (quoting *Hansard*, 2–9 Feb. 1990, cols. 1–2 (Cape Town: Government Printer)).

66. See Bouckaert, *supra* note 50, at 379 (“The ANC and the NP each came to the table with the realization that they had reached a stalemate in their often bloody struggle for power.”).

67. SPITZ & CHASKALSON, *supra* note 17, at 14.

68. Bouckaert, *supra* note 50, at 387.

69. See *id.* at 388 (“We are convinced that what we have agreed upon today can become a milestone on the road to true peace and prosperity for our country. In this we do not pretend to be the only parties

(IFP) continued and ground negotiations to a standstill in the townships.⁷⁰ However, with the mediating help of an interfaith group of church leaders led by Frank Chikane, the government and ANC moved out of political deadlock and signed the National Peace Accord in September 1991, a multilateral commitment to pursuing peace.⁷¹

Formally, what would be an arduous process of constitution-making began at Kempton Park (outside Johannesburg) in December 1991 with the Convention for a Democratic South Africa (or "CODESA I").⁷² As a foundational step, CODESA I established a multilateral movement toward a common vision. In the Declaration of Intent, a near-unanimous portion of the attendees pledged their commitment to a "united, nonracial and non-sexist state [and] multiracial democracy."⁷³ Moreover, the conference established five working groups focused on the following topics: establishing a free political climate, developing a constitution, forming a transitional government, reincorporating the homelands, and deciding time frames for the transition.⁷⁴

When negotiations resumed in May 1992 through CODESA II, the dialogue between the government and the ANC again grew tense as discussions began to implicate questions of who would gain or retain power in the transitional government. Although the two factions agreed on a number of principles, deadlocking the negotiations was the issue of what number would constitute the decision-making majority in the different regions.⁷⁵ In the wake of a stymied conference, violent incidents took place, including an attack on the ANC by IFP hostel dwellers, an event which cost forty-nine lives and threatened the negotiation process as a whole.⁷⁶ Subsequent to this attack, the Ciskei Military killed twenty-eight people ANC protestors who had entered the homeland.⁷⁷ Faced with these examples of spiraling violence,⁷⁸ South Africa solicited

involved in the process of shaping the new South Africa . . . All of us henceforth walk that road in consultation and cooperation with each other." (quoting TIMOTHY D. SISK, *DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT* 94 (1995)).

70. Bouckaert, *supra* note 50, at 387.

71. *Id.*

72. SPITZ & CHASKALSON, *supra* note 17, at 18.

73. Bouckaert, *supra* note 50, at 390.

74. *Id.*

75. *See id.* at 391 ("The ANC saw the issue [of the majority size for decision-making authority] in light of its commitment to democratic majority rule and as an attempt to preserve minority privilege, and both sides refused to budge.").

76. *Id.*

77. *Id.* at 392.

78. *See* Marianne Geula, Note, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 61 (2000) ("The ferocity of the violence, both within South Africa and in the bordering countries, heightened the

international intervention; ultimately, however, the international response did not prove instrumental in the negotiation process.⁷⁹

When productive negotiations did resume, they resumed as a result of encouragement from a surprising corner of the discussions: Joes Slovo, Chairman of the South African Communist Party and commander of Umkhonto, ANC's military wing.⁸⁰ Few people were ambivalent toward Slovo, a white South African who was an established and controversial political voice.⁸¹ In his groundbreaking 1992 article, "What Room for Compromise?," Slovo argued that the power imbalance between the South African government and the resistance movement made an unconditional surrender by the ruling regime an unrealistic goal.⁸² Rather, the "dangerous radical"⁸³ counseled compromise, suggesting that the focus of negotiations should remain on "the acceptability of the package as a whole," rather than "minor details" such as those which were currently shackling productive dialogue among the factions.⁸⁴ In his article, Slovo outlined essential features⁸⁵ which compromise could not diminish, including: a mutually agreed upon compendium of constitutional principles, a permanent constitution adopted by a sovereign, democratically-elected body, and a specific plan for transition toward democracy.⁸⁶ Yet, Slovo also suggested areas in which compromise might be justified, such as a "sunset clause" allowing for a discrete period in which power could be shared between the regimes, an informal agreement resolving the regional power dispute, general amnesty for past crimes, and employment benefits for civil servants and security

realization among the major parties that this stalemate might only be resolved through extreme bloodshed or negotiation.").

79. See Bouckaert, *supra* note 50, at 391-92 ("[T]he United Nations sent peace observers to work with the National Peace Accord and Goldstone Commission structures, and urged other international organizations to do the same . . . However, in contrast to its interventionist approach in Yugoslavia and Somalia, the United Nations seemed intent on forcing the parties in South Africa to formulate their own solution to the problem.").

80. *Id.* at 392.

81. See *id.* ("[Among many white South Africans,] Slovo was seen as a dangerous radical and as the ultimate traitor to his race. Conversely, few whites in South Africa could compete with Slovo for the love and admiration he received from black South Africans.").

82. *Id.*

83. *Id.*

84. Bouckaert, *supra* note 50, at 393.

85. See *id.* (Conversely, Slovo also listed "impermissible" features, including: a minority veto applied to the writing of the constitution, a mandatory power-sharing regime, a permanent agreement regarding the regional powers and boundaries, and any compromise which would perpetuate contemporary racial imbalances.).

86. *Id.*

personnel.⁸⁷ Ultimately, through meetings in January and February of 1993 (the “Kempton Park Talks”), Slovo’s suggestions became the structural model which was at the center of a tentative agreement between the once deeply divided ANC and South African government.⁸⁸

With the resuscitation of the negotiation process, several factors subsequently enabled the process to move more quickly toward conclusion. First, after the assassination of Chris Hani, a popular ANC leader, Mandela counseled for sobriety.⁸⁹ Indeed, the assassination had the counterintuitive effect of provoking the ANC toward a quicker resolution to the talks, including the establishment of an April 27, 1994 date to the first democratic elections.⁹⁰ Second, although the government and ANC sought external support for their bilateral agreement in May 1993, the compromises proved untenable for right wing extremists, who subsequently left the negotiating table,⁹¹ clearing the political road considerably.⁹² Third, the global community offered more explicit support of the negotiation process and its resolution.⁹³ Bearing witness to the international awareness and endorsement of the transitional process ensuing in South Africa, Mandela and De Klerk would share the Nobel Peace Prize in 1993.⁹⁴

Although the formal negotiations inaugurated at CODESA I, CODESA II, and the subsequent Kempton Park Talks were directed toward the construction of a workable constitution, it is impossible to understand why the TRC was defined as a political settlement without accounting for the politics of the constitution-making. Although the TRC did not begin its hearings until 1996, it was negotiated and is anticipated in the “postamble” to South Africa’s Interim Constitution, which states in relevant part:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated

87. *Id.*

88. *See id.* at 394 (“[T]he National Executive Committee of the ANC adopted Slovo’s proposals as the strategic perspective which would guide the ANC through the negotiations, and returned to the negotiating table.”).

89. Bouckaert, *supra* note 50, at 394.

90. *Id.*

91. *See id.* at 395 (Although the Inkatha Freedom Party (IFP) and the extremist white right left to form the Freedom Alliance, opposed to the transition process, the violence which the Freedom Alliance incited merely “inflicted [damage] on the image of the highly splintered right-wing movement.”).

92. *See id.* at 394 (“The walkout and the violence which ensued had the positive effect of strengthening the center and allowing the remaining parties to resolve additional points of dispute more quickly.”).

93. *Id.* at 396.

94. Bouckaert, *supra* note 50, at 396.

with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be dated after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.⁹⁵

The postamble to the Interim Constitution sought to provide a recapitulation of the Constitution's proposals for the future of South Africa in lay terms⁹⁶ and was the product of negotiations similar to that which defined the entire constitution-building process.

Despite being the product of one of the last nights of negotiation and "tacked on" to the Interim Constitution, it would be historical revision to argue from those facts that the postamble was politically an afterthought of the negotiations process.⁹⁷ Rather, a central argument of this article is that the political momentum (and, at times, deadlock) occasioned by the negotiations process found a necessary resolution in the drafting of the postamble, and as a result, predated the political settlement that was the TRC. The preceding context of the negotiations as a whole—a process which spanned three years and ten months, from February 1990 to November 1993⁹⁸—provides the necessary backdrop to the political tension preceding the drafting of the postamble and the formal completion of the Interim Constitution. From the outset of the negotiations during 1993, a central problem emerging across the negotiation table was whether leaders in the Nationalist Party government were subject to prosecution or extradition.⁹⁹

For those involved in the negotiation process, the question of legal response to NP leaders was a live one, for at that point, apartheid had been deemed in violation of international law.¹⁰⁰ In its initial form, the Constitution

95. SPITZ & CHASKALSON, *supra* note 17, at 412.

96. See *id.* ("This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colored, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation between the people of South Africa and the reconstruction of society.").

97. *Id.* at 413.

98. *Id.* at 414.

99. See Geula, *supra* note 78, at 62 ("Whether the leaders of the NP government could be subjected to prosecution or extradition under international law remained an open question.").

100. See John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 291(1998) ("Although apartheid was an international crime there was no suggestion from the United Nations, following the peaceful transition from apartheid to democracy between

contained no amnesty clause; indeed, ANC leaders were not only adamant in their refusal to entertain the notion of blanket amnesty, but sought a closer investigation of potential excesses on the part of the NP government.¹⁰¹ In effect, the political terrain of both South Africa's history as well as the immediate context of the negotiations process led the bargaining parties to a standoff: in the period of the negotiations, because South Africa's situation no longer presented a viable threat to international peace, an international criminal tribunal (such as that created for Rwanda under the UN Charter's Chapter VII powers) was not justified.¹⁰² Moreover, while the new regime could decide to prosecute NP leaders for their involvement with apartheid, prosecution would have been politically untenable given the NP government's active presence throughout the constitution-making process and transition period.¹⁰³ As a result of the political landscape at the culmination of an already beleaguered series of talks, only two alternatives remained: unconditional (blanket) amnesty or conditional amnesty for specific individuals.¹⁰⁴ As the postamble illustrates the result of political negotiation—and indeed, the means inaugurating South Africa's democratic state—was the constitutional inclusion of conditional amnesty for “political” crimes.¹⁰⁵

III. THE BIRTH OF A METANARRATIVE

Understanding the Truth and Reconciliation as first and foremost a political settlement need not eviscerate the TRC of its ontological worth. However, as

1990 and 1994, that those responsible for the worst features of apartheid should be brought to international justice.”).

101. Geula, *supra* note 78, at 61–62.

102. Dugard, *supra* note 100.

103. *Id.* at 291–92 (noting that the National Party likely expected to be “rewarded with places in a government of national unity” functioning under an interim Constitution).

104. *Id.* at 292.

105. What constitutes “political objectives” for the purposes of conditional amnesty remains the subject of great debate. See, e.g., Ronald Slye, *Justice and Amnesty*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 174, 179 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) [hereinafter LOOKING BACK] (“While all states accept in principle the legitimacy of the political office exception, there is no consensus on the definition, interpretation, and application of the exception.”); Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304 (2002) (“Determining whether an act was associated with a political objective, or, articulated more broadly, how a political crime should be defined, presented considerable difficulty to the Committee.”); Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 213 (1997) (“Conceivably, [the political amnesty clause] gives the Committee the discretion to deny amnesty for certain acts, even if they served a political goal, on the grounds that the ‘political’ act in question was too horrific or disproportional to the goal pursued to qualify for amnesty.”).

this article argues, to understand the TRC outside its political context—and in an artificial marriage to pure ideology—is to generate a metanarrative that may ultimately prove a fiction, to the detriment of its advocates and adherents. This article militates against that (pervasive) perception of the TRC, and instead, seeks a more balanced perspective, one which can better gauge the application (or non-application) of the TRC to the experiences of states engaging the restorative justice question. In this discussion, the initial section will set out the element of the TRC as they developed subsequent to the drafting of the Interim Constitution. Subsequently, the discussion shifts to the international community's reaction toward the South African experience, and analyzes whether that experience has been justly interpreted. Under the thesis of this article, the international community has not, in fact, portrayed the TRC in an objective fashion, and instead, developed a restorative justice mythology that continues to be perpetuated today.

A. Forming the TRC: Process and Elements

Although the formal legislation inaugurating the TRC was not enacted until two years after the completion of the Interim Constitution, the outline for its existence was foundationally negotiated through the series of political compromises between the National Party and the African National Congress.¹⁰⁶ However, while the general concept—conditional amnesty—may have been a negotiated and settled concept, the precise mechanism by which that amnesty could be granted remained opaque.¹⁰⁷ Complicating matters was the realization that a context-appropriate model for the TRC might prove difficult to find. A pivotal player in the early discussions concerning the TRC, Minister for Water Affairs Kader Asmal, articulated these difficulties: “[t]here is no prototype that can be automatically used in South Africa. We will be guided, to a greater or lesser extent, by experiences elsewhere, notably in those countries that managed to handle this highly sensitive—even dangerous—process with success. But at the end of the day, what is most important is the nature of our particular settlement and how best we can consolidate the transition in South Africa.”¹⁰⁸

Although South Africa was not without precedent to consult in the creation of its TRC, South Africa was distinguished as the first such attempt to officially

106. See LYN S. GRAYBILL, *TRUTH & RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL?* 2 (2002) (“The whole notion of amnesty in the TRC . . . was largely the outcome of various compromises that had been hammered out between the African National Congress (ANC) and the National Party (NP) in the transition period leading to the adoption of an interim constitution in 1993, with input from twenty-six political parties.”).

107. See *id.* at 3 (“Although amnesty had been agreed to in the interim constitution, the procedures had been left open.”).

108. *Id.* at 1 (quoting *THE HEALING OF A NATION?* 27 (Alex Boraine & Janet Levy eds., 1994)).

invite public debate and engagement with the practical development of a truth commission.¹⁰⁹ At the outset, when nongovernmental organizations, spiritual leaders, and human-rights lawyers first began discussing the possibility of a truth commission as a means of transitional justice for South Africa,¹¹⁰ the creators of the Commission turned to prior truth commissions in Brazil, Argentina, Chile, and El Salvador for practical guidance.¹¹¹ In fact, in 1994, the Institute for Democracy in South Africa (IDASA) sponsored two conferences which allowed delegates from Chile, Argentina, and eastern and central Europe to narrate their own context-specific struggles in dealing with former members of oppressive regimes.¹¹² These conferences served to increase the public dialogue concerning the potentially problematic features of the truth commission model of restorative justice.¹¹³ For example, when considering the Latin American examples, a problem that featured prominently in each situation was difficulty in maintaining accountability for uncooperative perpetrators of crimes.¹¹⁴ Borrowing from the flawed histories of these prior truth commissions, the creators of the TRC wanted to ensure the cooperation of those involved in the human rights violations in South Africa's apartheid history.¹¹⁵

Although South Africa's TRC was the first truth commission to be established by Parliament rather than presidential decree,¹¹⁶ the legislative process remained a "patchwork of all the viewpoints of the country,"¹¹⁷ and others have maintained that the enactment of the Truth and Reconciliation Act remained very much a settlement of political compromises.¹¹⁸ On several points, the legislative momentum could have ground to a halt. From May 1994 through March 1995, the parliamentary Standing Committee on Justice (whose

109. See GRAYBILL, *supra* note 106.

110. See Eisnagle, *supra* note 5, at 224 ("The idea that something like the TRC would be necessary in order to help ease South Africa's transition from the system of apartheid to a democratic system was first developed by nongovernmental organizations, religious leaders, and human-rights lawyers.").

111. *Id.*

112. GRAYBILL, *supra* note 106.

113. *Id.*

114. See Eisnagle, *supra* note 5, at 224-25 ("The creators of South Africa's truth commission quickly realized that many of the truth commissions in Latin America failed to get the cooperation of the perpetrators of crimes that had been committed. For example, Chile's truth commission, the Rettig Commission, possessed no judicial powers. This lack of power meant that the commission could not establish culpability or impose penalties.").

115. *Id.* at 225.

116. GRAYBILL, *supra* note 106, at 3.

117. *Id.* at 2-3.

118. See *id.* at 3 ("The process reflects to a certain degree party political compromises and not so much 'the will of the people.'"); see also CHRISTIE, *supra* note 20, at 81 ("The TRC was to some extent driven by ANC directives and to some extent by various different groups within civil society.").

members spanned all the major political parties) met to hold public hearings asking for recommendations concerning the draft legislation, debate these recommendations, and drafting the legislation itself.¹¹⁹ Illustrating the difficulties of the process, in March 1995, the Committee met daily and ultimately invested 127 hours before tabling the draft to the National Assembly.¹²⁰ When Parliament passed the bill on May 17, 1995, nearly a year had elapsed since its presentation.¹²¹

Among the several potential areas for political deadlock was the concern over whether the amnesty hearings should be held in secret.¹²² The National Party objected early to the clause in the initial draft of the bill declaring that the committee and sub-committee meetings would be open to the public.¹²³ After further deliberation, the bill was only accepted with a concessionary "secrecy clause."¹²⁴ To the NPs detractors, the clause constituted a desire to obfuscate the history of what had occurred or avoid indictment, a violation of the Bill of Rights, and an affront to both the victims and survivors of apartheid.¹²⁵ Rising to the NPs defense, others argued that secrecy was necessary to protect witnesses.¹²⁶ However, faced with overwhelming external support of public hearings,¹²⁷ the Committee ultimately overturned the cabinet's decision to include a secrecy clause and returned to a draft which allowed for public hearings with provisional conditions on when in-camera hearings would be allowed.¹²⁸

Further complicating the political process of drafting the Truth and Reconciliation Act was the choice of commissioners.¹²⁹ After rejecting an initial suggestion that commissioners be appointed by the president as inviting political favoritism, most of the parties to the process agreed on creating a consulate

119. GRAYBILL, *supra* note 106, at 2.

120. *Id.*

121. *Id.*

122. CHRISTIE, *supra* note 20, at 83.

123. *Id.* at 84.

124. *Id.*

125. *See id.* ("[P]erhaps the most damning view of this attempt to make amnesty proceedings secret was the fact that the people who had suffered would never really know who had ordered the violations in the first place and how such things operated, whether in a systematic or haphazard way.")

126. *Id.*

127. *See* CHRISTIE, *supra* note 20, at 84-85. ("The various NGOs and organizations were quick to react to [the possibility of a secrecy clause] and in a press statement endorsed by 30 of them argued that secrecy was contrary to the Bill of Rights and violated the rights of victims and survivors of the apartheid regime, including the right to information and fair administrative proceedings.")

128. *Id.* at 85.

129. *See id.* ("How would commissioners be appointed? What kinds of qualities would a commissioner require? What measures should be taken now?").

between the president and the cabinet to pick the members.¹³⁰ However, the process by which the commissioners would be chosen remained unclear: while the political entities involved in the negotiations sought to preserve democratic participation in choosing members, the Non-governmental Organizations (NGOs) (again exerting their influence) maintained that commissioners should not be subject to a political appointments process, but rather, selected through an evaluation of their personal qualities.¹³¹

Finally, the passage of the Truth and Reconciliation Act also required navigating the problematic political waters of what constituted a “political” crime for the purposes of the legislation.¹³² Several criteria were proposed to determine what might constitute a political crime: the “gravity” of the offense, whether a “reasonable and proportional relationship” existed between an individual’s political objective and means used to attain that objective; and whether the act was directed against the government, political opponents, or private individuals.¹³³ The criteria were adopted from a list of principles compiled by Carl Norgaard, then President of the European Commission on Human Rights, who had researched the application of the political offense exception in extradition law.¹³⁴ However, the NP rejected these criteria, arguing that the ANC were not subject to the same criteria, and that the principles, as applied, would amount to a witch hunt on the part of the ANC.¹³⁵ These differences of opinion resulted in political deadlock between the two parties,¹³⁶ and a compromise was not reached until the NP conceded to a contextual understanding of the Norgaard principles. These principles were codified into section 20 of the Truth and Reconciliation Act.¹³⁷

130. *Id.*

131. *See id.* at 86 (The qualities suggested in deciding who should be a commissioner included: an ability to make impartial judgments; moral integrity accompanied by a known commitment to human, rights, reconciliation, and disclosure of truth; no high profile political involvement or affiliation; not a potential applicant for amnesty within the bounds of the legislation.).

132. CHRISTIE, *supra* note 20, at 86.

133. *Id.* at 87.

134. Bhargava, *supra* note 105, at 1312.

135. CHRISTIE, *supra* note 20, at 87–88.

136. *Id.* at 88.

137. As codified, the Act suggests that the Committee consider the following principles in determining whether an act was a political crime:

[T]he motive of the person who committed the act; the context in which the act took place; the legal and factual nature of the act, including the gravity of the act; the object or objective of the act, and in particular whether the act was primarily directed at a political opponent or against private property or individuals; whether the act was committed in the execution of an order of, or on behalf of, or with the approval of a political organization or the state; the relationship between the act and the political objective pursued, and in particular the directness and proximity of the relationship and

After years of apartheid-related human rights abuses, and drawing from the postamble drafted at the culmination of years of negotiation, the South African Parliament enacted the Promotion of National Unity and Reconciliation Act 34 (or the Truth and Reconciliation Act) on July 19, 1995.¹³⁸ According to its stated objectives, the TRC would investigate the human rights abuses occurring within a determined period after March 1, 1960, grant amnesty to those who would "make full disclosure" within the given period, afford victims an opportunity to narrate the violations they suffered, and facilitate nation-wide healing and reconciliation.¹³⁹ As established, the TRC did not exist as a judicial body—it possessed no power to punish or determine any form of liability, and indeed could provide amnesty to those who might make full disclosure of such acts, if those acts could be related to political objectives.¹⁴⁰ The quasi-legal body was composed of sixteen members, with Desmond Tutu, the Anglican Archbishop of Cape Town, serving as chair.¹⁴¹ Three committees established by the TRC assess, respectively, human rights violations, reparations and possible rehabilitation, and justice.¹⁴² Moreover, by its own legislative mandate, the TRC committees only cover those "gross" violations of human rights which occurred between March 1, 1960 (the Sharpeville massacre) and December 5, 1993 (the date that the transitional government was established). With these elements, the

the proportionality of the act to the objective pursued.

Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at <http://www.polity.org.za> [hereinafter Truth and Reconciliation Act]; see also Bhargava, *supra* note 105, at 1312 [hereinafter Truth and Reconciliation Act].

138. Truth and Reconciliation Act, *supra* note 137.

139. *Id.* at 1. In relevant part, the Truth and Reconciliation Act states:

[The objectives of the Truth and Reconciliation Commission are to:] [P]rovide for the investigation and establishment of as complete a picture as possible of the nature, causes, and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights. . . .

Id. (emphasis added).

140. CHRISTIE, *supra* note 20, at 90.

141. *Id.*

142. *Id.*

Truth and Reconciliation Act inaugurated the TRC after a process of negotiation and political concession. From December 1995 until October 1998 (when a 3500-page final report was presented to President Nelson Mandela), the TRC held hundreds of hearings, received the statements of 21,000 individuals, and processed more than 7000 applications for amnesty.¹⁴³

B. Ideology

With Nelson Mandela at the helm, his new government, the Government of National Unity (GNU) faced the daunting task of navigating the terrain of a land that was defined largely by the ravages of apartheid policies.¹⁴⁴ As discussed above, although issues of national unity and reconciliation—which have rightly captured the imagination of the global community—were crucial to the vocabulary of the TRCs creation, the fundamental engine of the new Constitution and the TRC was the political desire to ensure a peaceful transition to democracy.¹⁴⁵ The driving factors in these negotiations were not simply truth and reconciliation—both values were abstractions that, while derivative of a peaceable negotiation's result, were subject to the political concessions characteristic of the entire negotiation. However, today, a ten-year space has allowed for a re-reading of the South African narrative. Few acknowledge that the TRC was forged in the furnace of political dissention, and throughout its hearings, was subject to internal and external controversy.¹⁴⁶ Just as the focus of the international community in the mid-1970s was on the particularities of South Africa's oppressive apartheid regime,¹⁴⁷ today, the international focus is on the semiotic weight of South Africa's TRC as a restorative justice success story.¹⁴⁸ Significantly, there exists a "schism" between the response of South

143. Daly, *supra* note 5, at 122.

144. See Charles, *supra* note 23, at 82 ("The most pressing problem confronting the new government was how to reconcile a country that had been torn apart for decades by apartheid.").

145. *Id.* at 82–83.

146. See Colleen Scott, *Combating Myth and Building Reality*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 107, 108 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) ("To say that the TRC was controversial would be a radical understatement. Thanks to the transparency of the entire process, it even generated controversy outside the country. Several of the South African political parties declined to accept the TRC officially.").

147. See Jeremy Rabkin, *The Politics of the Geneva Convention: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169, 196 (2003) ("South Africa's apartheid system probably exhibited the most systematic policy of racial discrimination practiced by any state in the world at the time and was roundly denounced by almost every other state. It provoked particular fury among the newly independent states, which, by the mid-1970s, constituted, the majority of the General Assembly.").

148. See, e.g., François Du Bois, "Nothing but the Truth": the South African Alternative to Corrective Justice in Transitions to Democracy, in LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 91 (Emilios Christodoulidis & Scott Veitch eds., 2001) ("[J]ust as the architects of the South

Africans and non-South Africans to the TRC—while the TRC enjoys an exceedingly high international reputation, many South Africans themselves remain “skeptical” of its benefits.¹⁴⁹ Describing the development of this metanarrative early in the TRC’s development, journalist Antjie Krog wrote, “It is clear that the commission has taken on a moral life of its own and is willing to oppose even the party that gave it birth.”¹⁵⁰ Ironically, a process geared toward the cathartic reconstruction of a legitimate narrative and “exposing reality”¹⁵¹ can itself become subject to historical re-reading and revision.

The TRC’s semiotic weight derives largely from its development within intersecting spheres of politics and ideology. At the outset of the resistance movement in South Africa, political and ideological goals existed in a functional marriage. As Jakes Gerwel, former Director-General in the Office of the State President describes: “[n]ational reconciliation was . . . concurrently imbedded in the anti-apartheid and democratic struggle.”¹⁵² What makes productive analysis of the TRC difficult is the conflation of political goals or concessions (in the push toward a democratic state) with ideological guideposts (such as national reconciliation). Therefore, a critique of the TRC as a developing metanarrative needs to engage in some conceptual severance in order to parse out the reasons for its constructed mythology.

In many ways, the reasons behind the formation of the TRC as a dominant ideological metanarrative flow from its own legislative mandate to focus on those gross violations of human rights that characterized decades of injustice and oppression.¹⁵³ As a result of the limited range of actions implicated within the terms of the TRC, those “gross violations” became representative of the apartheid years.¹⁵⁴ Naturally, with the focus on such egregious acts, the TRC was translated, for the global community, from a primarily political narrative

African strategy drew on experiences elsewhere, others have looked expectantly towards South Africa for a precedent on dealing with past injustice in the transition to democracy.”).

149. Daly, *supra* note 5, at 156. Daly observes further that outsiders may have the “luxury” of focusing on the TRC’s promise (rather than its shortcomings) because “they do not live with the problems of quotidian life in South Africa and can think about how the lessons learned in South Africa can be used in other parts of the world.” *Id.* at 158.

150. Shriver, *supra* note 14, at 13 (citation omitted).

151. See Scott, *supra* note 146, at 111 (“The South African TRC was—and is—about peeling away deceit and exposing reality.”).

152. Jakes Gerwel, *National Reconciliation: Holy Grail or Secular Pact?*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 277 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

153. *Id.* at 279.

154. See *id.* (“These limited categories of human rights violations, subsequently heard and publicized by the TRC, had in a sense to symbolically carry the burden of that entire past of division, strife, conflict, suffering, and injustice.”).

into a primarily ideological narrative.¹⁵⁵ The overall result of this new metanarrative has been a conceptual shift, one which invited a move away from the “statist” perception of the apartheid regime and the ensuing negotiation process to “a more human substantive understanding based in social history and biography.”¹⁵⁶ Through public hearings that became the site for oral histories, the TRC sidestepped its laborious birthright in the political negotiations process and acquired a literary legacy and force.¹⁵⁷ The overall result was a Commission that took on mythological proportions by adopting a universally-applicable vocabulary for discourse.¹⁵⁸

Politically, the individuals who were involved in the TRCs development amplified its construction as an ideological formula rather than its original position as a “primarily formal measure in [the] overall political settlement.”¹⁵⁹ In particular, with Bishop Desmond Tutu¹⁶⁰ and Dr. Alex Boraine¹⁶¹ at the helm, the Commission was naturally overlaid with vocabulary that traversed the sacred and secular.¹⁶² The ethos of forgiveness captured by the TRC fueled a view of the Commission as having an almost scriptural intonation.¹⁶³ The public

155. See *id.* (“The pure horror of those narratives of suffering, degradation and the personal tragedy, of human beings caught up and involved as victims and perpetrators, could not but have focused the national attention and awareness on the deeply personal and emotional levels at which people in this society, given its history, should (also) reconcile with each other and with themselves for their part in structured brutality.”).

156. *Id.*

157. See Gerwel, *supra* note 152, at 280 (“It is in the construction of such a lineage of narratives of national remembrance that the TRC may be found to have made its most lasting contribution. As an event of story-telling, confession and forgiving, within a quasi-judicial framework, it represented a unique moment in the country’s history—an interstitial pause for a nation to acknowledge its unity and intimate inter-connections also in perversity and suffering.”).

158. See Teitel, *supra* note 1, at 83 (“Conflating public and private choices [in the restorative justice model] signaled the breakdown and interconnection of the private and public spheres, a phenomenon associated with globalization. The perceived democratic deficit has led to the pursuit of a universalizing and legitimizing discourse.”).

159. Gerwel *supra* note 152, at 280.

160. See Paul Lansing & Julie C. King, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 *Ariz. J. Int’l & Comp. L.* 753, 785 (1998) (noting that the choice of Tutu as chairperson of the TRC has been subject to criticisms that the TRC was dominated by “an element of clericalism”).

161. Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 *TUL. J. INT’L & COMP. L.* 59, 96 n.292 (2003) (At the time of his appointment as Deputy Chairperson of the TRC, Dr. Boraine was a prominent “former church leader.”).

162. See Nancy J. Holland, “Truth as Force”: Michel Foucault on Religion, State Power, and the Law, 18 *J.L. & RELIGION* 79, 92 (2002) (“The reconciliation at issue [in South Africa’s Truth and Reconciliation Commission] remains . . . ambivalent between a socio-political rite of, if not forgiveness, at least reintegration into the social fabric of the society, and religious salvation.”).

163. See Eisnagle, *supra* note 5, at 229 (“The TRC best exemplifies how an international truth commission focused on the theological goals of restorative justice would look and function.”).

hearings, in particular, re-framed the TRC as less an agent for political transition and rather, an agent for spiritual rehabilitation. For those involved, Tutu's leadership informed the tenor of the proceedings: "[Tutu] wept with the victims and marked every moment of repentance and forgiveness with awe. Where a jurist would have been logical, [Tutu did not hesitate] to be theological. He sensed when to lead audience members in a hymn to help a victim recover composure and when to call them all to prayer."¹⁶⁴ Ultimately, the spiritual vocabulary engaged by the TRC leadership helped amplify the TRCs development into the restorative justice narrative. As a result, contemporary elements of TRCs in different countries are instinctively associated with a theological discourse.¹⁶⁵

Moreover, economically, these are beneficial times for transitioning states to be utilizing restorative justice ideologies. As a result of the popularity of the TRC metanarrative in the global community, nations in transition may become more influenced to pursue a restorative justice model since "they rely disproportionately on international legitimacy and material aid."¹⁶⁶ The effect of these subtle economic pressures is not only a more categorical acceptance of truth commissions, but also the perpetuation of a mythology which, as discussed *infra*, may be ill-suited to meet its professed goals.

IV. SOUTH AFRICA TODAY—WHEN CONFESSION PROVES INSUFFICIENT

Since the metanarrative of the TRC turns largely on the presumption that cathartic truth-telling and forgiveness could repair a nation broken by apartheid, a productive critique of South Africa's TRC must also examine the effectiveness of this model of restorative justice. Has the TRC made strides in the national reconciliation it sought to inaugurate? This section of the article suggests that the culture of confession modeled in the TRC and dominating contemporary discourse concerning restorative justice is more cathartic¹⁶⁷ than constructive.

The contemporary culture of restorative justice, and of current truth commission models, is forward-looking, focusing on the future possibilities of

164. *Id.* at 230 (quoting Peter Storey, *A Different Kind of Justice: Truth and Reconciliation in South Africa*, NEW WORLD OUTLOOK, July/Aug. 1999, at 17).

165. See, e.g., Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 Harv. Int'l L.J. 287, 293 (2003) ("Churches in Sierra Leone played a significant role in the peace negotiations through the Inter-Religious Council of Sierra Leone, so the choice of a religious leader for the commissioner may resonate with the country.").

166. Daly, *supra* note 5, at 111–112.

167. See Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1265 (2003) ("Critical to the investigatory function of the TRC was the catharsis of personal storytelling by survivors, witnesses, and wrongdoers. According to Archbishop Tutu and others, storytelling as the articulation of suffering is therapeutic, rehabilitative, and educational; it was the first step toward forgiveness and reconciliation.").

forgiveness and reconciliation. In discussing the development of restorative justice, Ruti Teitel notes: “[f]orgiveness became a distinctive form of political apology, understood as an act of contrition in a realm of unity politics.”¹⁶⁸ Suddenly, personal rehabilitation is replete with political significance.¹⁶⁹ The outstanding question, however, is to what degree confession and truth-telling are effectively therapeutic measures.

If a proper critique of the Truth and Reconciliation is to develop, a fundamental premise must be challenged: is this new, forcible re-encountering of the past¹⁷⁰ a productive therapy? Although contemporary scholarship concerning the TRC may assume otherwise,¹⁷¹ as a matter of “intellectual historiography and human self-understanding,” the notion of revisiting the past in order to move forward is a value that is “under siege.”¹⁷² Restorative justice models are nominally attached to the legal sphere, yet truth commissions may now engage a more metaphysical process.¹⁷³ The question of whether past-orientation can be a successful means of nation-(re)building is critical today, for six years after the final report of the TRC, many South Africans continue to wonder “why the end of the rainbow seems so dull.”¹⁷⁴

While the TRC established an express goal of promoting national reconciliation, the process of individual applications created a confusing interface between politics and ethics: while the limited number of cases seen by the TRC naturally took on symbolic force in moral terms, the screening process was defined by a legal definition of those acts which could claim a political

168. Teitel, *supra* note 1, at 84.

169. See Daly, *supra* note 5, at 86 (“In the TRC’s understanding, reconciliation, through individually experienced, has national ramifications.”).

170. See Scott Veitch, *The Legal Politics of Amnesty*, in LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 33, 36 (Emilios Christodoulidis & Scott Veitch eds., 2001) (“[L]aw is conventionally future-oriented [and] retrospectively is shunned [because] law’s normativity is bound up with the possibility of obeying or disobeying its commands.”).

171. See, e.g., Daly, *supra* note 5, at 132–33 (“The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for [reconciliation].”).

172. Teitel, *supra* note 1, at 86.

173. See *id.* at 87 (“The question remains whether there are any transitional justice baselines or any threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice-seeking. . . . The relevant inquiry is not a metaphysical enterprise, but rather must be understood in its historical and political context.”) (emphasis added); but see Daly, *supra* note 5, at 134 (“While justice and healing are not synonymous, there is a certain commonality in the sense that both are concerned with achieving a balance, within the body or the body politic.”).

174. Daly, *supra* note 5, at 156–57 (observing that some South Africans themselves believe the TRC to have produced “division and pain and very high but unfulfilled expectations of closure and healing”).

objective. The amnesty process developed according to an individual-by-individual mechanism; for example, when thirty-seven ANC members sought amnesty for human rights violations on which they did not elaborate, that “blanket” amnesty was categorically denied.¹⁷⁵ However, the individualization that characterizes the amnesty process has counterintuitive results. While the individual narrative gains a certain moral force, particularly in light of hearings which stressed the quasi-religious parables of oral histories, the overt language of the hearings maintains an (arguably artificial) distinction between the legal and ethical spheres by focusing on the language of actions “associated with a political objective.”¹⁷⁶ Although the TRC panel ultimately considers the ways in which expression of “moral aspects” as a component of the “process of reconciliation in its broader context,” the panel refuses to confer a judgment based on the “moral appropriateness” of an action in its prior context.¹⁷⁷ The argument of this article is that the TRCs legacy has been confused as a result of two conflated contexts: the moral and legal spheres. The national reconciliation for which the TRC was tailored cannot exist merely on symbolic or moral grounds, which is the force of the TRCs legacy.

Confounding the TRCs pursuit of truth (as a necessary predecessor to reconciliation)¹⁷⁸—and thereby complicating the TRCs legacy—is the complex interrelationship between truth and memory. In analyzing the amnesty process instituted by the TRC, legal theorist Scott Veitch observes: “[T]ruth is not the object to be uncovered in the contemporary hearings on amnesty, but rather what is to be articulated is the truth of the manifestation of memory. Moreover, this memory is not itself simply an object, since it is inseparable from the performative process that recalls it as an event.”¹⁷⁹ Effectively, the theoretical complication of the TRC is that “truth,” in all its assumed, capitalized grandeur, is not necessarily an artifact of the past that can then be subject to forensic¹⁸⁰ discovery. Rather, truth operates in tandem with an individual’s disclosures, and the process which constitutes memory is located in “no less than the decision-making process of the amnesty panel.”¹⁸¹ Ultimately, the process is

175. Veitch, *supra* note 170, at 38.

176. *Id.*

177. *Id.*

178. *See id.* at 39 (observing that the TRC premised amnesty on the notion that truth was required for reconciliation); *see also* Du Bois, *supra* note 148, at 92 (“‘Reconciliation through truth’” was the lodestar of the South African vision of transitional justice.”) (quoting unnamed source).

179. Veitch, *supra* note 170, at 39 (emphasis original).

180. For a discussion of various definitions of “truth” examined by the TRC, *see infra* Part III. My use of the term “forensic” here is not intended to be conflated with a forensic concept of truth, which was arguably dismissed by the TRC. *See* Du Bois, *supra* note 148, at 97–98 (“The TRC itself discounted the value of the ‘forensic’ notion of truth.”).

181. Veitch, *supra* note 170, at 39.

problematic because the amnesty hearings are dependent on what is essentially “not the truth of the event but of its accounting . . . [which] from the point of view of adjudication [is] unknown and unknowable.”¹⁸² Since the TRC panel already possessed a distinct view on the events of apartheid,¹⁸³ the practical result of the TRCs emphasis on full disclosure is an inevitably political re-evaluation of the past events.¹⁸⁴

Perhaps most fundamentally, the TRC is problematic in its assumption that confession and truth-telling will produce a psychological benefit of reconciliation and a social benefit of nation-building without the “settled” quality of a judicial decision or the requisite repentance of a theological process.¹⁸⁵ As François du Bois, law professor at the University of Cape Town, observes: “[t]o engage in the search for understanding is therefore to express a commitment to the possibility of meaning. Hence, before the search can begin, that possibility must be established.”¹⁸⁶ Simply put, can nation-building, reconciliation, and justice be legitimate results of truth-telling when “truth” itself is flexible in meaning? According to the Final Report from the TRC, four notions of truth are implicated in the public hearings: “factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth and healing and restorative truth.”¹⁸⁷ However, the ethos of the hearings, and in particular, the emphasis on oral confession as preceding reconciliation, suggest that the notion of “healing and restorative truth” was the guiding principle of the Commission’s work.¹⁸⁸

182. *Id.* at 40.

183. See Du Bois, *supra* note 148, at 93–94 (noting that the question of how to approach the past nearly derailed the initial transitional negotiations because it was a position of power to “control the past”).

184. See Veitch, *supra* note 170, at 42 (“The explicit insertion of a conditional re-reading of the events of the past requires a determinedly political assessment of the legal response.”); Du Bois, *supra* note 148, at 107 (“[T]he TRC’s truth was as conditioned by the network of power relationships that existed during the transition as criminal trials would have been.”). See Veitch, *supra* note 170, at 41 (noting that further complications of political assessment of memory is inconsistency in application outcomes and that inconsistency may result from judges who have naturally not been able to distance themselves from “assessing qualitatively” the applications for amnesty).

185. See Du Bois, *supra* note 148, at 96 (“[There is an underlying] suspicion that the search for truth does *not* provide a way out of the dilemma of having to choose between, and deal with the draw-backs of, impunity—allowing the past to rule the future—and victor’s justice—allowing the future to harness the past to its own ends.”).

186. *Id.* at 97.

187. *Id.* (quoting TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 110 (1998)).

188. See *id.* at 98. (“It is difficult to see how the TRC could have concluded [that any notion of justice would take priority over ‘healing truth.’] . . . It was meant to be neither a court nor a promoter of impunity. Its task was not to establish guilt, but to establish responsibility. Since it could not judge or punish, it had to diagnose and heal.”).

Another difficulty with conditional amnesty which focuses simply on “full disclosure”¹⁸⁹ of some politically-associated act is the divergence between confession and repentance. Is repentance, and not merely confession, what is required of a truly forward-looking attempt at reconciliation? In the dialectical tension that exists between secular law and ethics, it often appears that “repentance belongs to another world, to another universe of discourse.”¹⁹⁰ Aeyal M. Gross, law professor at Tel Aviv University, emphasizes that legal discourse can indeed bear sociologically relevant fruit: “[d]uring transitions, the law plays a pivotal role in shaping social memory through trials, investigations, and TRCs. The preservation of a historical narrative during transitions is crucial for addressing past events that have not been talked about, as well as for informing the evolution of a more democratic society.”¹⁹¹ However, the shaping of a society’s collective memory and the development of a coherent historical narrative may not effect nation-wide reconciliation.¹⁹² Problematically, these notions of reconciliation and a truthful social memory are often conflated in scholarly analysis.¹⁹³ For Gross, to “some small degree,” repentance was indeed a part of the TRC process, but “only under certain conditions and as part of the forgiveness-repentance exchange.”¹⁹⁴ However, other studies have suggested that indeed, truth may not lead naturally to either repentance or reconciliation.¹⁹⁵ Capturing this perspective is the widow of resistance leader Steve Biko, tortured to death by South African police during the apartheid regime. Although ultimately unsuccessful, Biko’s widow joined other individuals and organizations in petitioning that the statute establishing the TRC (and its conditional amnesty) be declared unconstitutional.¹⁹⁶

Ironically, the TRCs emphasis on “healing and restorative truth” may have subverted its own pursuit of nation-building and reconciliation. Reconciliation in the abstract requires a communion of equal (as opposed to politically imbalanced) adversaries: reconciliation thus argues for “the creation of some

189. See Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47, 69 (2004) (“The South African process required publicly acknowledging the past and exposing the offences of the apartheid regime.”).

190. *Id.* at 47 (quoting J. M. COETZEE, *DISGRACE* 58 (1999)).

191. Gross, *supra* note 189, at 68 (emphasis added).

192. See *id.* (“[D]ealing with the past extends beyond the sphere of criminal responsibility and personal impunity, encompassing larger questions that countries must address in times of transition.”).

193. See *id.* at 68–69 (suggesting that the desire for “[n]ational [u]nity and [r]econciliation” is conceptually equivalent to the mission of “fashion[ing] a new consensual memory of the past as one of injustice”).

194. Gross, *supra* note 189, at 72.

195. See generally PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2002).

196. Gross, *supra* note 189, at 75.

commonality, the transcending of at least some differences.”¹⁹⁷ However, the TRCs extension of conditional amnesty changed the rhetoric of the political dialogue from that of “perpetrators and victims” to an amorphous group of “confessors” of oral histories.¹⁹⁸ The TRC thereby struggled with competing desires for a “healing truth” (which diminishes the distinctions between victim and perpetrator) on the one hand and reconciliation (which presumes a distinction between victim and perpetrator) on the other. As a result, the Commission may have been fighting a losing battle in its attempt to inaugurate lasting reconciliation. After the Final Report of the Commission was released, the Report was subject to criticism by South Africans on either side, both of which argued that the “truth” which the TRC was meant to unveil did not emerge.¹⁹⁹ Ultimately, the TRCs legacy is problematic: in its own Report, there is a frank acknowledgment that “everyone who came before the Commission did not experience healing and reconciliation.”²⁰⁰ Although certainly, the TRC should not be held to unrealistic goals, this article has argued that its fundamental premises were flawed, and therefore, substantiates a critique of the metanarrative of this restorative justice model that now dominates the international community.

V. CASE STUDY: RWANDA

A. *Background on the Rwandan Genocide of 1994*

While officials in South Africa sought to develop a tenable foundation for the TRC, in central Africa, the country of Rwanda became the backdrop for genocide of global proportions. Before one hundred days would pass, the Rwanda of 1994 would be the stage for anachronistically primitive carnage. The Rwandan genocide of 1994 was singular in several respects: “the number and concentration of deaths, the intensity of the killing, the extensive use of rape as a form of ethnic violence, and the massive involvement of the Rwandan population.”²⁰¹ Although controversy surrounds every attempt at explaining the

197. Du Bois, *supra* note 148, at 103.

198. See *id.* (“[T]he truth required for reconciliation is one that restores to victims the dignity needed to face perpetrators as equals, and accordingly, as the TRC realized, acknowledges victims as *victims*. This, however, implies that the distinction between victims and perpetrators be kept alive, emphasized even.”); Gross, *supra* note 189, at 70 (noting that the conditional amnesty conferred by the TRC “risked creating symmetry between the perpetrators of apartheid and its victims”).

199. See Du Bois, *supra* note 148, at 113 (“Although the criticism of the *Report* from different sides in the apartheid struggle might tempt one to the satisfying conclusion that the TRC was impartial, it is vital to note that the common ground established by the symmetry of these reactions lies in a shared rejection of the TRC’s truth.”).

200. *Id.* at 112.

201. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34

triggers of the genocide,²⁰² all scholars concede that in the period from April 7 to July 17, 1994, between 500,000 and 1,000,000 Rwandans²⁰³ were killed by hundreds of thousands of their fellow Rwandans.²⁰⁴ Systematic in its progress²⁰⁵ and brutally primitive²⁰⁶ in its realization, the stark efficiency of the genocide drew comparisons with the Holocaust.²⁰⁷ In sum, approximately ten percent of the Rwandan national population died within the span of one hundred days.²⁰⁸

Although precise reasons for the events of 1994 are difficult to delineate, any productive analysis of the genocide must consider the importance of ethnicity in Rwanda, and particularly, what some have argued as the long-standing rivalry between the majority Hutus and the minority Tutsis.²⁰⁹

N.Y.U. J INT'L L. & POL. 355 (2002) [hereinafter *Daly II*]. As *Daly* notes, in the 100 days of the Rwandan genocide in 1994, the approximated figure of one million Rwandans killed by hand corresponds to the death toll in Washington, D.C. and New York on September 11, 2001, if those deaths occurred every single day for 3 months. *Id.* at 355 n.1.

202. See *id.* at 358 ("Among the disputed issues are the numbers of people who killed and who were killed; the extent of Hutu and Tutsi animosity before the genocide; . . . the role of European colonizers and the Catholic Church in fomenting racial distrust; . . . the role of the international community . . . ; and the extent to which the genocide could have been prevented.").

203. Although most approximations of those killed during the 1994 genocide fall within this (admittedly generous) range, the precise figure remains controversial. See, e.g., PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 4 (1999) ("[A]t least eight hundred thousand people were killed in just a hundred days. Rwandans often speak of a million deaths, and they may be right."); Drumbl, *supra* note 11, at 1222 ("[A]n estimated 800,000 people were murdered in an attempt to wipe out the Tutsi inhabitants of Rwanda."); Maureen Laflin, *Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide*, 46 ADVOC. (IDAHO) 19 (2003) ("Over a span of just one hundred days in 1994, upwards of 1,000,000 people died in the genocide in Rwanda.").

204. *Daly II*, *supra* note 201, at 361.

205. See Drumbl, *supra* note 11, at 1245 ("The Rwandan genocide was organized by the Rwandan government, supported by local authorities, and undertaken by ordinary Rwandan men and women. The violence did not arise out of anarchic chaos. Nor did it emerge from a general breakdown of norms governing group and individual behavior.").

206. See *id.* at 1245-46 ("These killings were not depersonalized through physical distance or the use of technology. Victims were butchered with machetes (panga), sticks, tools, and large clubs studded with nails (masu).").

207. See GOUREVITCH, *supra* note 203 ("[T]he dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.").

208. Drumbl, *supra* note 11, at 1223.

209. See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 166 (2000) ("Since pre-colonial times, an ethnic, social, political, and economic rivalry has existed between the Hutus and the Tutsis in central Africa."); but see Drumbl, *supra* note 11, at 1242-43 ("From an historical and anthropological perspective, ethnic cleavages in Rwanda are less pronounced than in other regions where genocidal violence has taken hold . . . Historically, both groups were

Certainly, the vocabulary of ethnic classification existed during Rwanda's colonial era, when both Belgian and European colonizers placed an administrative premium on acknowledging group identities.²¹⁰ Among the controversies surrounding the Rwandan genocide, however, is the extent to which ethnic classification is a proper contextual frame.²¹¹ Regardless, whether conflict between the Hutus and the Tutsi was a well-entrenched historical reality prior to the latter decades of the twentieth century,²¹² few contest that ethnic conflicts reached a head after Hutu Juvenal Habyarimana seized the presidency in a 1973 coup d'état.²¹³ In particular, tensions increased during the latter years of Habyarimana's presidency, when Rwandan government forces engaged in sporadic armed conflict with the Rwandan Patriotic Front (RPF), the army of Tutsi refugees and expatriates.²¹⁴ These tensions peaked into the one hundred day genocide after Habyarimana's death in a plane crash on April 6, 1994.²¹⁵ The ethnic discourse underlying the Rwandan genocide develops from a widely-acknowledged belief that "the propaganda of the Habyarimana government and its genocidal successor induced many Hutu to believe that the [minority] Tutsi were about to attack them," and therefore, to engage in genocide was actually a "preemptive strike."²¹⁶ It is uncontested that in the years prior to the genocide,

socially fluid, with intrasocietal divisions operating more along clan (ubwoko) lines than 'ethnic' lines.").

210. See Carroll, *supra* note 209, at 167 ("For administrative purposes, the Belgian colonial rulers established a system of national identification cards with the ethnic classifications: Hutu, Tutsi, and Twa. The European colonizers accentuate ethnic differences and solidified group identities through this categorization . . . Additionally, ethnicity is recorded on Rwandan's identity cards and in the census.").

211. Daly, *supra* note 201, at 359.

212. Heated debate currently surrounds the question of whether there was historical animosity between the Hutus and the Tutsis. See Carroll, *supra* note 209, at 167 ("Hutus may have been resentful of the favoritism Europeans showed the Tutsis during colonial times. From the early 1960s, when the Hutus gained power, to the 1990s, ethnic violence erupted periodically. Massacres occurred in 1959, 1963, 1966, and 1973."). But see GOUREVITCH, *supra* note 203, at 59 (noting that until 1959, there had "never been systematic political violence recorded between Hutus and Tutsis—anywhere").

213. See Carroll, *supra* note 209, at 167–78.

214. Laflin, *supra* note 203, at 19; see AMNESTY INTERNATIONAL, GACACA: A QUESTION OF JUSTICE 3 (2002), available at <http://web.amnesty.org/library/index/ENGAFR470072002> (last visited Mar. 23, 2004) [hereinafter QUESTION OF JUSTICE] ("[The one hundred days of genocide] occurred within the context of an on going, albeit intermittent, armed conflict (October 1990 to July 1994) between the RPF and Rwandese government forces . . . Following the RPF invasion, and preceding the killings that occurred between April and July 1994, local authorities—with government connivance—launched 17 large-scale attacks against Tutsi in 12 communities, killing an estimated 2,000 individuals.").

215. Extremists among the Hutu accused the RPF of assassinating President Habyarimana. U. S. INSTITUTE OF PEACE, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE (1995), available at <http://www.usip.org/pubs/specialreports/early/rwanda1.html> (last visited Mar. 21, 2004) (hereinafter ACCOUNTABILITY FOR WAR CRIMES).

216. Drumbl, *supra* note 11, at 1243.

any collective identity that once may have existed in Rwanda was dissipated, and a "ferocious acrimony" existed between the Hutu and the Tutsi.²¹⁷

During the one hundred days of the Rwandan genocide, among the most significant characteristics of the tragedy were the systematic manner of the slaughter and the wide-spread contribution to its progress. Not only did hundreds of thousands of Rwandans contribute to the deaths of Hutu oppositionists and Tutsis,²¹⁸ systematic encouragement from radio messages and leaders from every social tier²¹⁹ helped incite what was effectively a "populist genocide."²²⁰ In a Special Report on Rwanda, the United States Institute of Peace notes that typically, when countries experience violations of human rights on the scale of Rwanda, that violence is most often sponsored by military and political organizations, while "the rest of society [is free] to go about its business with relatively clean hands."²²¹ However, by contrast, the Rwanda genocide featured a "deliberate attempt to force public participation on as broad a basis as possible, co-opting everyone . . . [and] inciting civilians to participate in the massacre."²²² In a UN study following the genocide, a Special Rapporteur to the UN Commission on Human Rights found the genocide to be "concerted, planned, and systematic," citing: the government use of radio broadcasts to incite ethnic dissension and violence, government distribution of arms to the militias and civilians, the discovery of lists naming those to be executed, and the speed with which the massacres were initiated after the April plane crash.²²³ As a result, the reach of the genocide extended across every social line and every vocational barrier.²²⁴ Although there was no forced recruitment into the militia, young Rwandan males flocked into the ranks, creating what would become 500,000 active militia members.²²⁵ While armed forces and local police engaged in the violence, professionals such as physicians and teachers were often equally enthusiastic participants.²²⁶ Indeed, teachers figured prominently

217. *Id.* at 1244.

218. Daly, *supra* note 201, at 361–62; see Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31 (2002) ("The high level of public participation and complicity in the killings, attacks, rapes and pillages, is particularly disturbing. The slaughter often took place in broad daylight within the perpetrators' local communities and was committed against neighbors, friends and even family members.").

219. GOUREVITCH, *supra* note 203, at 115.

220. Daly, *supra* note 201, at 361.

221. ACCOUNTABILITY IN WAR CRIMES, *supra* note 215.

222. *Id.*

223. Carroll, *supra* note 209, at 170.

224. See Daly, *supra* note 5, at 162 ("Most were murdered not by professional military personnel, but by fellow citizens, neighbors, friends, teachers, priests, and even family members.").

225. Drumb, *supra* note 11, at 1247.

226. *Id.*

in the genocide, with schools forming the backdrop for scenes in which Hutu teachers would denounce Tutsi pupils to the militia or even murder their own students.²²⁷ The Rwandan genocide, therefore, is a study in paradox: while the scope of public participation might suggest a spontaneous and fierce combustion of intra- and inter-tribal tensions, the execution of the campaign was the result of measured, deliberate, individual and corporate choices.

Despite the hundreds of thousands of Tutsi deaths, the Tutsi-populated Rwandan Patriotic Front seized control on July 18, 1994 and the fledgling government began the process of repairing a nation fundamentally changed.²²⁸ In just three months of intense conflict, only 40,000 to 50,000 men and women remained of the 350,000 inhabitants in the capitol city of Kigali.²²⁹ Without running water, electricity, or a functioning government infrastructure, the capitol was a shadow of its former self and emblematic of the systemic problems occurring in the rest of the country as well.²³⁰ In fact, in the wake of the genocide's ravages, the World Bank declared Rwanda the poorest nation on earth.²³¹ In a Special Report, the Organization for African Unity describes the crippled state of Rwanda post-genocide: "Nothing functioned. There was a country but no state. There was no money; the genocidaires had run off with whatever cash reserves existed . . . There were no organs of government, either centrally or locally. There was no justice system to enforce laws or to offer protection to the citizenry."²³² The new government, therefore, faced a daunting task: the rebuilding of a national infrastructure and the reconciliation of inhabitants whose mutual history was characterized by distrust and political upheaval.

B. Development of the Gacaca Courts

While South Africa moved toward restorative justice through its TRC, Rwanda chose to take a more punitive route, through three separate forums, two more traditionally punitive and one seeking a middle-ground of sorts: the International Criminal Tribunal for Rwanda (the ICTR), the domestic criminal justice system, and the Gacaca courts.²³³ Significantly, a retributive justice

227. *Id.*

228. ACCOUNTABILITY FOR WAR CRIMES, *supra* note 215.

229. *Id.*

230. *Id.*

231. GOUREVITCH, *supra* note 203, at 270 (observing that in the wake of the genocide, 95 percent of Rwandans lived on an average income of 16 cents per day, or 60 dollars per year).

232. Daly, *supra* note 201, at 366. (citation omitted).

233. Laflin, *supra* note 203, at 20. The United Nations established the ICTR through Resolution 995 in November 1994, but the first trial did not occur until 1997. Rosilyn M. Borland, *The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights* 1 (Fall 2003) (unpublished manuscript), available at

model was then applauded by other countries: "With the support of most of the international community, including Amnesty International, the Rwandese government opted for extensive prosecution, arguing that it wanted to end the impunity that characterized Rwandese political culture. Justice, the new government deemed, was the necessary and indispensable premise to national reconciliation."²³⁴ However, these measures have proven far from successful—despite promises to ensure "individual criminal accountability" for perpetrators, the ICTR had brought only a little over a dozen cases to judgment as of 2003,²³⁵ the consistently weak judicial system in Rwanda²³⁶ suffered from severe backlog in its case dockets,²³⁷ and despite much discussion over the Gacaca courts in the last five years, the Gacaca system has yet to progress in implementation beyond a few pilot projects.²³⁸ Moreover, the judicial crisis leaves Rwanda in dire

http://www.american.edu/academic.depts/sis/sword/Current_Issue/essay1.pdf. (last visited Oct. 06, 2005)

234. QUESTION OF JUSTICE, *supra* note 214, at 4.

235. See Borland, *supra* note 233, at 1 ("While the ICTR has made important strides for international humanitarian law, including the first conviction of rape as a war crime, in general it has not met the needs of the Rwandan people."); Victoria Brittain, *Letter from Rwanda*, THE NATION, Sept. 1, 2003, available at <http://www.thenation.com/doc.mhtml?i=20030901&s=brittain> ("The United Nations Criminal Tribunal for Rwanda, which sits in Arusha in neighboring Tanzania, is trying major genocide suspects but has been plagued by internal bickering and inefficiency. It has completed only fifteen cases, and acknowledges that it will be unable to complete the trials of the forty-nine suspects now under arrest before it ends in 2008."); Ironside, *supra* note 218, at 32 ("The International Criminal Tribunal for Rwanda . . . secured fewer than nine convictions in five-and-a-half years of operation, despite an annual budget of approximately \$80 million [in U.S. currency] and over 800 staff members.").

236. See Borland, *supra* note 233, at 1 ("Rwanda's legal system was basically destroyed during the genocide; of approximately 785 judges practicing before the genocide, only 20 survived."); Laflin, *supra* note 203, at 20 ("The pre-genocide judicial system in Rwanda was extremely weak, suffering from limited resources, insufficiently trained personnel, and a lack of judicial independence. The genocide totally destroyed it. For over two years following the genocide the country was without a functioning legal system. Not until the latter part of 1886 did the Rwandan judiciary become operational once again.").

237. See Borland, *supra* note 233 ("Within Rwanda, only about 5,000 of the more than 100,000 jailed as genocide suspects have been tried."); Brittain, *supra* note 235 ("The broken judiciary, rebuilt at record speed, has begun trials, but it could never complete anywhere near 100,000 in this generation."); Ironside, *supra* note 218, at 32 ("While the domestic genocide trials have made greater progress with its dockets, having cleared an estimated 5,000 cases since 1996 . . . [,] even if this pace were maintained, it would still take upwards of 120 years to prosecute the estimated 110,000 to 130,000 alleged genocidaires who continue to be held in overcrowded prisons and community lock-up cells throughout the country."); Laflin, *supra* note 203, at 20 ("By the end of 2001, the country's domestic criminal justice system had conducted approximately five thousand genocide-related trials, leaving approximately 125,000 suspects in jails or prisons designed to accommodate only 15,000. It has been estimated that using the conventional court system would take over two hundred years to try the cases of those already incarcerated for crimes related to the genocide. There are simply not enough judges, prosecutors, and lawyers.").

238. See Laflin, *supra* note 203, at 21 ("Contemporary Gacaca courts are still in their infancy. In June 2002, the country started a four-month pilot project with eighty courts. By December 2002, some 600 courts had opened. The goal is to have an estimated 10,000 courts in operation.").

economic straits as well: “while the expense of feeding the detainees has been shared thus far with the international community; donors have indicated that Rwanda will have to bear an increasing amount of this burden in the future, which it cannot afford.”²³⁹ Naturally, this economic pressure translates into the politics of Rwanda’s nation-building: like South Africa in the early stages of its transition period, Rwanda’s transition necessarily takes place under the watchful eye of the international community.

Of the three proposed solutions, the Gacaca courts are distinct from the ICTR and the traditional criminal justice system—an alternative dispute resolution mechanism, the Gacaca courts were first mentioned in 1998 after it became increasingly clear that the other means of judicial resolution were insufficient to try the over 100,000 detainees suspected of having participated in the genocide.²⁴⁰ The Gacaca system soon became a much-lauded, non-conventional option, in similar fashion to the way in which the TRC became the cinderella story of restorative justice for the international community.²⁴¹ This reaction is in contradistinction to the wariness of some Rwandan people. As Anastase Nabahire, director of the genocide survivors group Ibuka²⁴² observes: “Gacaca is a compromise political solution, but at this point, it is all we have to look forward to.”²⁴³

Although the scholarship concerning the Gacaca courts has yet to be fully developed,²⁴⁴ what is known is that it is a community-based form of alternative

239. Ironside, *supra* note 218, at 39.

240. L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT’L & COMP. L. REV. 385, 386 (2003).

241. See QUESTION OF JUSTICE, *supra* note 214, at 2 (“[The gacaca system is] an ambitious, groundbreaking attempt to restore the Rwandese social fabric torn by armed conflict and genocide by locating the trial of those alleged to have participated in the genocide within the communities in which the offenses were committed.”); Ironside, *supra* note 218, at 33–34 (“[I]n the context of post-genocidal Rwanda, Gacaca may well be able to heal the deep wounds that continue to divide the country by ethnicity in a manner for which Western retributive systems are not designed. Indeed, it is unrealistic, impractical and short-sighted to rely solely on the ordinary criminal model with all of its due process guarantees to address mass perpetration of crimes, particularly in a country whose judicial system has to be build ex nihilo and where ethnic tensions continue to run high.”); Radha Webley, *Gacaca and Reconciliation in Post-Genocide Rwanda* 1 (2004) (unpublished manuscript), (“When I left for Rwanda, I was extremely hopeful. Most of the reports and analyses I had read on the subject were overwhelmingly positive, both in relation to the potential of the gacaca courts as a reconciliatory initiative and in relation to the process of reconciliation overall in Rwanda.”). available at http://www.hrcberkely.org/download/report_wradha.pdf. (last visited Oct. 6, 2005).

242. *Ibuka* means “remember” in Kinyarwanda. See Prevent Genocide.Org, Kinyarwanda and Rwanda Links, available at <http://preventgenocide.org/rw/links.html>. (last visited Oct. 6, 2005).

243. Borland, *supra* note 233, at 2.

244. See Tully, *supra* note 240, at 395 (“Relatively little is known about the practice of gacaca . . . [which was] a community-based dispute resolution forum[] in pre-colonial Rwanda.”).

dispute resolution that developed in the pre-colonial period.²⁴⁵ The term "Gacaca" connotes "lawn," which indicates the manner in which the members of a Gacaca court would sit on the grass while listening to disputes brought before the community.²⁴⁶ Significantly, the Gacaca courts consistently "maintained restitution and reconciliation as their primary aims."²⁴⁷ Although sanctions (such as compensation) were introduced for an offense, imprisonment was not an option, and the sanctions were meant to educate the perpetrator regarding the gravity of the offense as well as reintegrate the accused into his or her community.²⁴⁸ In similar vein to the TRC, genocide suspects who confess fully to their crimes will have their initial sentence halved; moreover, all suspects tried in the Gacaca system may serve half of their sentence doing community service rather than in prison.²⁴⁹ Since many suspects have now spent ten years in prison, many of those tried under the Gacaca system will not remain imprisoned but may return to their communities.²⁵⁰ In its temporal structure, the Gacaca system develops in four phases: first, raising awareness and increasing knowledge about the law;²⁵¹ second, election of judges from the community; third, "confession, testimony, and reconciliation," and fourth, reintegration of some prisoners back into the society through a work program.²⁵² Today, the Gacaca system is split into sections to adjudicate different categories of crimes, with varying degrees of severity: at the lowest (village) level, the court will only adjudicate property crimes (category 4 crimes); the sector and district Gacaca courts will try more serious crimes (category 3 and 2 crimes); those accused of ordering killings or rape (category 1 crimes) will be tried in conventional courts.²⁵³

The restorative aims of the Gacaca system, as well as the community atmosphere of the court system, defined the types of disputes relevant to the courts. Traditionally, these disputes would concern "inheritance, civil liability, failure to repay loans, thefts, . . . conjugal matters . . . and minor criminal

245. *Id.*

246. *Id.*

247. *Id.* at 396 (emphasis added).

248. *Id.*

249. Webley, *supra* note 241, at 5 n.5.

250. *Id.*

251. See Borland, *supra* note 233, at 2 ("One project . . . involved producing and distributing films, radio broadcasts and other media to help spread information about *gacaca*. In this project, Rwandans watched a film about *gacaca* elections, more than 200,000 read a cartoon strip on the same topic, and an estimated 2.7 million people were exposed to radio messages about *gacaca*.").

252. *Id.*

253. Brittain, *supra* note 235. Although category 1 cases will not be tried in *gacaca* courts, *gacaca* judges take testimony as part of the category 1 process. Borland, *supra* note 233, at 2.

offenses such as theft.”²⁵⁴ Notably, these community-based courts thus appear to have been formed for the purpose of reinstating those accused of minor relational offenses, as opposed to the inexpressibly violent crimes committed during the 1994 genocide. Throughout the evolution of the Gacaca court system from the pre-colonial period onward,²⁵⁵ the emphasis remained on disputes “between family members or neighbors,” while disputes with strangers were more likely to be heard in state tribunals.²⁵⁶ Precisely since the Gacaca system was not originally meant to adjudicate the types of crimes committed during the 1994 genocide, when the Transitional National Assembly of Rwanda adopted Gacaca Law on October 12, 200, the current Gacaca system is conceptually distinguished from the traditional practice.²⁵⁷ According to the Rwandan government, these Gacaca jurisdictions will try crimes that occurred between October 1, 1990 and December 31, 1994.²⁵⁸ Ultimately, the goal is to have 10,000 Gacaca jurisdictions in Rwanda composed of individuals elected by the immediate community,²⁵⁹ and judgments will be made either by consensus or by majority voting.²⁶⁰

C. *The Politics of Reconciliation in Rwanda*

On April 7, 2004, Rwanda remembered the ten-year anniversary of the 1994 genocide. However, despite the passage of a decade, Rwanda continues to struggle in its attempts to rebuild a nation ravaged financially, politically, and emotionally:

254. Tully, *supra* note 240, at 395–96.

255. *See id.* at 396 (“During the colonial period beginning in 1897, first the Germans and then the Belgians introduced a more formal state-centered legal system in Rwandan society. . . . [L]egal pluralism evolved with gacaca, on the one hand, as an indigenous procedure based largely on traditional values and determining standards of individual and community behavior, and state laws, on the other hand, which were based predominantly on the Belgian framework.”).

256. *Id.* at 397.

257. *See id.* at 397–98. (In an attempt to distinguish the current gacaca concept from the traditional concept, the Rwandan government often refers to today’s system as “modernized gacaca” or “gacaca jurisdictions.”).

258. *Id.* at 398.

259. *See* Tully, *supra* note 240, at 398 (“Each gacaca jurisdiction will have a General Assembly, a Bench, and a Coordinating Committee. . . . The General Assembly of each cellule [the smallest administrative unit in the country] will then elect twenty-four people over the age of twenty-one of ‘high integrity.’ Of these twenty-four individuals, five will be selected to serve as delegates to the General Assembly at the Secteur level and nineteen will remain to serve on the Bench at the cellule level. Out of those nineteen who remain at the Cellule level, the Bench will elect five of its own members to serve on the Coordinating Committee.”).

260. *Id.* at 399.

There are 80,000 detainees in Rwanda's overcrowded prisons, some of whom are allegedly innocent, [awaiting] a fair trial. In some cases, their families and their home communities remain unconvinced that they will get one. Victims and survivors of the genocide also wait for justice and compensation for the human rights abuses they have suffered. Women and girls, in particular, were left infected with HIV or were left with permanent health complications and disease as a result of the brutal sexual violence they suffered. There are hundreds of thousands of Rwandese refugees who returned home involuntarily in the aftermath of the genocide to an unknown future, [and] another 60,000 remain outside Rwanda unsure if they want to return and afraid that their return may be forced.²⁶¹

For many, the Gacaca system seems to be the panacea after years of legal backlog and lack of resolution concerning the crimes committed in 1994.²⁶² Often, the language of accolade used in describing the possibilities of the Gacaca system is strikingly similar to that used to describe the TRC in South Africa.²⁶³ For example, in their 2001 text *Restorative Justice and Civil Society*, Heather Strang and John Braithwaite write: "For such profound collective wrongs as genocide and apartheid, the world is slowly learning that undominated and state-assisted storytelling is needed, so that truth can lay a foundation for reconciliation."²⁶⁴ In its rhetoric, the Rwandan government has

261. AMNESTY INTERNATIONAL, RWANDA: THE ENDURING LEGACY OF THE GENOCIDE AND WAR I (2004), available at <http://web.amnesty.org/library/Index/ENGAFR470082004> (last visited May 10, 2004).

262. See, e.g., Ironside, *supra* note 218, at 34 ("To date, criminal prosecutions have been the sole method by which justice has been sought for post-genocidal Rwanda. This is premised on the perhaps misplaced faith that accountability and reconciliation can only be achieved through a Western-conceived adversarial trial model, and that individual criminal accountability pursued against a select few will 'exonerate' the collective."); Tully, *supra* note 240, at 413-14 ("[I]t is undisputed that the system of justice that Rwanda has maintained for over five years has failed. With over 100,000 pre-trial detainees languishing in over-crowded prisons and local cachots, a compromise is unavoidable. . . . In the face of this daunting situation, the new gacaca jurisdictions have emerged as Rwanda's newest, and certainly most innovative, hope for justice and reconciliation.").

263. See Britain, *supra* note 235 ("Gacaca, with its emphasis on collective truth-telling as a means toward reconciliation rather than summary justice and punishment, has more elements in common with South Africa's traveling Truth and Reconciliation Commission of the 1990s than with, say, Latin American versions following dictatorships, such as Peru's."); Daly, *supra* note 5, at 167 ("The actual, if unrecognized, need for reconciliation may be as strong in Rwanda as it is in South Africa, though it manifests itself quite differently."); *Can the Gacaca Courts Deliver Justice?*, SOUTH AFRICAN PRESS ASSOC., Apr. 8, 2004, 2004 WLNR 7090283 [hereinafter *Gacaca Courts Deliver Justice*] ("[Robert Bayigamba, Minister of Culture, Youth and Sports declares that the gacaca system was intended] to accelerate the process of knowing the truth so that justice may be done.").

264. Borland, *supra* note 233, at 6 (quoting HEATHER STRANG & JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 11 (2001)).

been quick to portray the Gacaca system as a beacon of hope for the future—currently, national advertisement posters for the Gacaca system read “The Truth Heals” and “depict a bright yellow sun rising over the hills of Rwanda with villagers holding hands as they move from the dark toward the rising sun.”²⁶⁵ In part, this focus on restorative justice in Rwanda is a reaction against the poor results from the retributive justice campaign initiated by the Rwandan government after the genocide.²⁶⁶ The reaction of some scholars—and particularly advocates of the TRCs ideology—has been to promote the possibility of reconciliation in Rwanda. As Erin Daly, law professor at Widener University, writes: “clearly, if Rwanda is to survive, reconciliation can not wait 200 years²⁶⁷ and must be promoted in conjunction with Rwanda’s other immediate needs.”²⁶⁸ In this portion of the discussion, this article seeks to substantiate a critique of the Gacaca courts as undergoing a similar reification into metanarrative status as the evolution of the South African TRC.²⁶⁹ Toward that end, this article will examine the political and economic forces behind the Gacaca courts, and conduct an objective analysis of the current state of that system.

First, the question of whether the Gacaca courts will ever be functional is a real one. Although the Gacaca court initiative began in June 2002, it has yet to become operational beyond a few pilot models.²⁷⁰ In the first phase of its implementation, a USAID-funded study found that “while awareness is high, knowledge about the functioning of jurisdictions and the specific role of the community is rather limited.”²⁷¹ Moreover, as a result of several delays, training

265. Ironside, *supra* note 218, at 47.

266. See Daly, *supra* note 5, at 165–66 (“The government has embarked on an extensive campaign of arresting and incarcerating suspects believed to have participated, in any way, in the genocide. The result has been disastrous. It is estimated that 125,000 individuals are in jails or community ‘cachots’ (literally hiding places) while only 3000 trials have taken place. Thousands are dying of disease and malnutrition while the wheels of justice turn ever so slowly.”).

267. Daly, *supra* note 5 at 166 (The Rwandan government estimates that at the current rate of adjudication, it will take over 200 years to try all of the genocide suspects currently imprisoned).

268. *Id.* at 166–67.

269. Although there are substantial due process concerns with the gacaca system, this Article focuses more narrowly on a theoretical critique of gacaca law. See Ironside, *supra* note 218, at 51–56 (analyzing concerns for gacaca defendants, such as: the right to a fair hearing by a competent, independent and impartial tribunal, the right to have adequate time and facilities to prepare a defense and consult with counsel, and the right to review by a higher tribunal).

270. See Borland, *supra* note 233, at 3 (“As of November 2002, twenty-six pilot courts had begun hearing testimony.”).

271. *Id.* at 2 (quoting S. Gabisirege and S. Babalola, Johns Hopkins University, Center for Communications Programs, PERCEPTIONS ABOUT THE GACACA LAW IN RWANDA: EVIDENCE FORM A MULTI-METHOD STUDY (2002), available at <http://www.jhuccp.org/pubs/sp/19/English/19.pdf> (last visited Oct. 6, 2005)).

of judges did not begin until April 2002.²⁷² Pilot courts were not inaugurated until July 2002; four years after the first mention of a Gacaca system,²⁷³ and even afterward, community participation in the Gacaca courts have been lower than initially predicted.²⁷⁴

On an ideological basis, it is possible to argue that the current manifestation of the Gacaca court system is not the community-based, traditional system that is being lauded by the international community.²⁷⁵ In his on-site research for Amnesty International, Richard Haavisto describes latent concerns about Rwanda's Gacaca court system, and in particular, the lack of full community participation.²⁷⁶ When the pilot models began three years ago, community members often failed to attend trials, or did not provide testimony if they did attend.²⁷⁷ The initial interest in Gacaca law has "dropped markedly" since the pilot models began, and often, weekly Gacaca meeting must be canceled as a result of a failure to meet the one hundred person quorum requirement.²⁷⁸ According to Haavisto, fear is often a factor in dividing communities and malcontent concerning the Gacaca courts: "Many of those who might be willing to give evidence are afraid of retribution."²⁷⁹ The retribution factor is real, for while the TRC addressed crimes on the part of both the resistance movement and the Nationalist Party, the Gacaca system only deals with crimes committed by the "genocidaires," and not members of the Rwandan Patriotic Front, who gained control of Rwanda after the end of the 1994 genocide.²⁸⁰ Although the government has sought to affirm that witnesses will

272. *Id.* at 3.

273. *Id.*

274. *Id.*

275. See Ironside, *supra* note 218, at 59 ("[T]he Gacaca system's emphasis on restorative modes of justice, through participative story-telling, atonement, public scrutiny, and reintegrative community service, provide post-genocide Rwanda's best hope for progressing toward national reconciliation and some greater sense of justice."); Webley, *supra* note 241, at 8 ("[U]niversal participation is one of the theoretical underpinnings of the gacaca system itself, for such participation is seen as the central mechanism for making the dual processes of justice and of reconciliation not only institutional projects but felt realities in the lives of the Rwandan people.").

276. See *Gacaca Courts Deliver Justice*, *supra* note 263.

277. *Id.*

278. Webley, *supra* note 241, at 5.

279. See *Gacaca Courts Deliver Justice*, *supra* note 263 ("[T]here have been reports in the last few years of killings and attacks on witnesses who were expected to testify in gacaca courts."); Borland, *supra* note 233, at 3 ("Both inside and outside Rwanda, people of all ethnic groups fear the outbreak of renewed violence. Some witnesses are afraid they will be attacked if they speak the truth."); Webley, *supra* note 241, at 5 (describing one gacaca court where survivors refused to account for known genocidaires because the murderers "had never been imprisoned but were still living in the community in question").

280. *Gacaca Courts Deliver Justice*, *supra* note 263. U.N. consultant Robert Gersony found that "the RPF had engaged in widespread and systematic slaughter of unarmed civilians." *Id.* The NGO Penal Reform

be protected, “no clear security mechanism has been established to protect community witnesses who testify . . . and Rwandans have little reason at present to believe they will be protected.”²⁸¹ One Rwandan woman, Mbezuanda, was victimized by the Hutu militia, but remains terrified of testifying in a public court because it will be “her word against the accused . . . there are no other witnesses.”²⁸² Concerned that the wheels of justice move far too slowly to protect her, she believes that it would be dangerous to provide evidence: “Maybe by the time it comes I will be dead.”²⁸³ With many in these communities fearful of involvement and perceiving the tribunals themselves as one-sided, there is little implicit confidence in the system.²⁸⁴ As Haavisto notes, “The government has to create a climate which convinces people that there is an equitable system of justice at work.”²⁸⁵ For the several thousand Rwandan refugees currently in other countries, without a sufficient promise that they will be protected, voluntary return is unlikely.²⁸⁶

The possibility of a true “community”-based system post-genocide becomes further complicated in light of the historical disconnect between the community that experienced the persecution and that which is initiating the trial. Causing a fundamental rift is the reality that an enormous part of the population was involved in the genocide. As Elizabeth Onyango, of the non-governmental organization (NGO) African Rights observes: “[i]n Rwanda you have a situation in which a large part of the population participated in the genocide. A select few might have orchestrated it, but they did it so cleverly that they got a lot of the population implicated—and how do you try cases like this, all these people?”²⁸⁷ Although it could be argued that despite reconfiguration, the prosecutions are still taking place, the fundamental appeal of the Gacaca system for the international community was not merely the prosecutions, but the restorative ethos of the system. Will the “community” receive the perpetrator back into its midst after he or she serves the maximum time required by Gacaca law? The sentiments of at least one survivor toward the Gacaca system suggest otherwise:

International noted in a recent report: “There is a growing disenchantment with the first phase of the gacaca pilots: the number of participants is going down and many participants no longer express themselves during the meetings. The enthusiasm of some people has diminished considerably when they realized that Gacaca could not investigate the past.” Borland, *supra* note 233, at 4.

281. Borland, *supra* note 233, at 3.

282. *Gacaca Courts Deliver Justice*, *supra* note 263.

283. *Id.*

284. *Id.*

285. *Id.*

286. Borland, *supra* note 233, at 3.

287. *Gacaca Courts Deliver Justice*, *supra* note 263.

They killed us, completely finished us. Some of them were arrested and imprisoned, but recently they were released even though they had killed us. We had assumed that they would be killed the same way they killed us. So for us, we don't understand Gacaca . . . The people who killed us are being released. Those who are not being released we hear they will be imprisoned for life. There they eat, they live alright and grow old like normal people. We don't see the benefits for us in that process. They should have died the way we died.²⁸⁸

Another problematic feature of the Gacaca systems is the same as that which underlies South Africa's TRC as well—the often-indistinguishable lines between oral confession and memory, confession and truth. In Rwanda, like South Africa and most other African nations, there is a long history of oral tradition, where stories can be perpetuated for generations without written record.²⁸⁹ As a result, “people tend to blur the lines between what they have seen themselves, and what others have told them.”²⁹⁰ The oral tradition can then have a distinct impact on judicial proceedings, whether restorative or retributive. For example, in the ICTR, lawyers have recounted stories of how intense cross-examination of a witness can, days later, lead to the damaging revelation that “he did not actually see the event himself. . . . But his wife's aunt did.”²⁹¹ In the Gacaca courts, similar problems can surface. Describing her experience at a Gacaca court in the village of Kigese, journalist Victoria Brittain writes: “[a]s the hours went on, contradictory stories were told, and witnesses and defendants went off on irrelevant stories. Many times someone in the general assembly rose to ask the chairman to keep the witnesses to the point.”²⁹² Certainly, some have argued that both the Gacaca system and the TRC allow for justice through cathartic confession and the opportunity to offer a personal narrative: “[t]o have your story of unjust suffering entered into a public record and thence into future history-writing is to experience an increment of justice.”²⁹³ However, just as the

288. Webley, *supra* note 241, at 4.

289. See *Rwanda's Slow Justice*, BBC NEWS (May 19, 2001) available at http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/1338263.stm. (last visited Oct. 6, 2005) [hereinafter *Slow Justice*]; but see *Gacaca Courts Deliver Justice*, *supra* note 271 (“[As Elizabeth Onyango notes:] Rwanda is a society where people, because of all they've been through . . . don't really speak up. Gacaca does give people a chance to begin to talk about genocide.”).

290. *Id.*

291. *Id.*

292. Brittain, *supra* note 235.

293. Borland, *supra* note 233, at 10 (quoting Donald Shriver, *Where and When in Political Life is Justice Served by Forgiveness?*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 28 (Nigel Biggar, ed., 2001)).

TRC struggles with the question of whether confession and repentance can be fairly conflated, genocide survivors are equally wary of the sincerity of suspects in the Gacaca system.²⁹⁴ As one woman noted, prisoners who had returned into her community professed openly that if another genocide occurred, the “only thing they would do differently is to make sure to kill all of the Tutsis.”²⁹⁵ Ultimately, the dubious distinction between fact and fiction prolongs the judicial process and complicates the possibility for reconciliation.

The notion of community-based reconciliation becomes complicated when raising the question of whether “living together again,” one of the catchphrases of the Rwandan government’s reconciliation rhetoric, is currently at work.²⁹⁶ The ostensibly restorative aim of Gacaca law manifest through a community dialogue is a key political tool for the Rwandan government at a time when the international community is heavily invested in the restorative justice model. The Rwandan government has been vocal in its claim that the community-based Gacaca courts are the centerpiece of a reconciliation process—as one government official notes:

[Gacaca] is the biggest single investment in the reconciliation process. As soon as the victims of genocide see punishment for the perpetrators of genocide, they are ready to forgive. As soon as those who are in prison are facilitated to get out, to be tried, and to be reinserted into community, to do community service as part of the project, then you are building the bridges for conflict management, you are building the bridges for reconciliation, things have started gain. So gacaca is therefore tied to the reconciliation process, as soon as both parties to this unfortunate divide see that justice is being done.²⁹⁷

Officially, the Rwandan government insists that reconciliation is already beginning in Rwanda, and that “reconciliation [is] a process that can be both successfully engineered and successfully completed within a finite period of time.”²⁹⁸ However, there is a fundamental disconnect between the government rhetoric concerning the gacaca court system and how Rwandans view the methods.²⁹⁹

294. See Webley, *supra* note 241, at 10 (“Many . . . feel that . . . requests for forgiveness, as well as the confessions themselves, are wholly insincere, and emphasize that unless they are accompanied by true remorse, they will mean nothing, and will not in any way contribute to the process of reconciliation.”).

295. *Id.* at 9.

296. *Id.* at 3.

297. *Id.* at 4.

298. *Id.* at 2.

299. Webley, *supra* note 241, at 4.

A primary feature of this disconnect between the official perspective on gacaca law and that of the Rwandan people is the fact that the gacaca courts are explicitly state-run. Among many Rwandans, there is a prevailing suspicion that the gacaca system is merely a “government-run attempt to deal with a six-figure prison population.”³⁰⁰ The manner in which the gacaca system currently operates is effectively “top-down,” a factor that subverts the purposes of reconciliation and nation-building at the heart of the government’s rhetoric.³⁰¹ For example, at weekly gacaca meetings, armed security forces are often present, and coerced participation is “a relatively frequent trend.”³⁰² In their involvement during the gacaca process, district, sector, and national-level officials tended to be the voices driving the sessions, as opposed to merely possessing an administrative role.³⁰³ Effectively, the gacaca courts are enacting state-sponsored retribution rather than the restorative aims they profess.³⁰⁴

It is necessary to ask, further, whether there is, in fact, a gacaca system in Rwanda, or whether the pilot models are merely political mirages that will enable a poor state to collect money and military support from the West without moving any of the prisoners out. Since the gacaca system is being marketed to the international community as traditional African justice, it remains somewhat unassailable, because no external state will feel comfortable critiquing “African” justice.³⁰⁵ For example, while the public position of the United States on the Gacaca systems has been categorically positive, the United States has a political stake in promoting a nationally oriented and controlled justice for international crimes as a position against international tribunals. Ironically, while the gacaca system may be Rwanda’s carrot for economic aid from the international community, the gacaca courts themselves may prove a financial strain of the communities they purport to serve, particularly since most individuals do not receive compensation for their involvement.³⁰⁶

300. *Id.*

301. *Id.* at 8.

302. *Id.*

303. *Id.*

304. See Webley, *supra* note 241, at 10 (“[T]he government is actively manipulating the rhetoric of reconciliation in ways that seem to have little to do with a desire to actually further the process of reconciliation and that appear to have more to do with consolidating its own political power.”).

305. But see Britain, *supra* note 235 (“[G]acaca has come in for harsh criticism as unworkable from some sections of the donor community. How can untrained and mainly illiterate peasants be trusted with the judgment of tangled tales often involving their own relations? Where is the administrative capacity to process 100,000 dossiers or more? What will happen to the approximately half a million new suspects, now at large, named already in suspects’ confessions during the gacaca process of the past few months? What does the election as judges of some people known to have been active participants in the genocide say about the fairness of the trials?”).

306. *Gacaca Courts Deliver Justice*, *supra* note 263.

VI. CONCLUSION

At a time when nations rebuild and transition under the scrutiny of the international community, a new pressure exists to model a transitional justice that accommodates the political and ideological interests of other states. Particularly because the judicial model of a broken state can rarely operate without the economic backing and political involvement of other countries, it is nearly impossible to conceptually sever the issues central to restorative and retributive justice from political aims. Today, nations such as Rwanda and South Africa showcase the extent to which restorative justice has captured the approval of the global community. However, as this article argues, not only do the politico-economic contexts of South Africa's TRC and the Rwandan *gacaca* system powerfully shape each nation's restorative rhetoric, the ideological aims of these models may ultimately prove insufficient tools for nation-building.

Since the inauguration of South Africa's TRC, a fundamental shift has occurred in the international perspective on transitional justice—a jurisprudence of forgiveness and reconciliation has emerged as a dominant motif. As this article contends, while the emphasis on the restorative rhetoric of reconciliation and truth-telling may be compelling, the current situation may be one in which the reality of what restorative justice has effected may be in disjunction with the popular response. Complicating the narrative ethos of reconciliation narratives are a number of foundational questions: Whose story should be heard? Is a changing story necessarily a fiction? Is the storytelling merely cathartic or a symptom of repentance?

For South Africans, the TRC may have been a cathartic process of sorts, but the metanarrative of restorative justice now accepted by most of the international community does not account for the less-reconciliatory political realities which drove and continue to define the Commission's legacy. This article has sought to warn of the dangers of a categorical acceptance of restorative justice as a panacea, and establish a more productive critique of how these metanarratives develop, and on what grounds.

The ten-year anniversary of the Rwandan genocide recently passed, and it is clear that Rwanda is a state that has been influenced by the restorative justice metanarrative. While the *gacaca* system is a middle ground model—with both retributive and restorative attributes—it is largely the restorative aims of *gacaca* law that are being advertised internationally and nationally.

Despite the best of intentions, true nation-building and reconciliation will only develop from a less categorical and more critical understanding of the interplay of restoration, retribution, and the political state.

THE INTERNATIONAL CRIMINAL COURT AND HUMAN RIGHTS ENFORCEMENT IN AFRICA

*Obasi Okafor-Obasi**

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I. INTRODUCTION

The inauguration of a permanent tribunal for the prosecution of serious crimes has raised anew the problem of enforcement of human rights in international law. This article will commence with a brief mention of the origin and nature of state's human rights obligations. Reference will also be made to the implementation of international obligations with particular emphasis on the International Criminal Court (ICC), and the difficulties encountered in judicial enforcement of international obligations in general. The peculiar social, political and economic situation in Africa and the ingredients that feed the widespread human rights violations in the region will also be raised. In conclusion, suggestions for improvement will be proffered.

II. ORIGIN OF STATES HUMAN RIGHTS OBLIGATIONS¹

At the root of the difficulty, in the decisive enforcement of states international human rights obligations are the absence of an effective central authority, and the consensus method of building the international legal order. The Peace of Westphalia 1648, which ended the Thirty Years religious war in Europe effectively dismantled the absolutist, centralist powers of the Holy Roman Empire, and transferred sovereignty to the different nation states.

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1. While every society in whatever level of development has, however nominal, notions of freedom, human rights in its present documented form, as the cornerstone of peace and security in the world today became a forceful idea after the Second World War. See also Philip C. Aka, *Human Rights as Conflict Resolution in Africa in the New Century*, 11 TUL. J. COMP. & INT'L L. 179, 183 (2003).

Within their jurisdiction, states could virtually do any thing, and deal with their subjects in any way they liked without attracting any external question. But the horrors of the Second World War, which ended in 1945 called to question this unchecked and uncontrolled absolutist powers of the state-sovereignty. There was a realization that massive human rights violations with open or tacit support of the state in any part of the globe ultimately diminishes humanity in general and may even have the unintended consequence of threatening the peace and security of the world.²

While it is not necessary or even desirable to go back to this period of a single, absolutist authority in the international legal order, attempt to strike a balance has been made by placing obligations on states as a means of checking their excesses. There is now a common standard below which no state is allowed to fall without attracting the outrage of the world. At that point where this outrage begins, exclusiveness of domestic jurisdiction should stop.³ This common standard has been set through concepts such as *jus cogens* (peremptory norms of international law), *erga omnes* (obligations owed the international community as a whole), international crimes, which has been defined by the International Law Commission in its draft articles on states responsibilities as "breach by a state of an international obligation so essential for the protection of fundamental interests of the international community."⁴ A state's obligation to respect and ensure human rights is primarily inward directed. It is owed to its subjects. The international community gets interested only when a states conduct is so egregious as to threaten this fundamental interest of the international community. This interest is nothing other than maintenance of peace and security which is better secured by respecting human rights.

These concepts, *jus cogens*, *erga omnes* and international crimes share more or less the same contents that dovetail into the present human rights provisions. It is quite tempting therefore to rank all human rights equal because of their dependence on one another. But certain acts are so egregious and mind rending that they merit special attention. Through these concepts, some human rights have been selected as super norms and given an extra protective status. Genocide, slavery and racial discrimination, aggressive war, war crimes and crime against humanity today form the red line beyond which none should cross. These norms are final and admit of no derogation. Any breach of these

2. Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20-40 (1948). See also Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in THE FUTURE OF INTERNATIONAL LEGAL ORDER, VOL. 1 33 (Richard A. Falk & Cyril E. Black eds., 1969).

3. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y. INT'L L. 1, 46 (1946).

4. See Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, at 131 (Ch. III), U.N. Doc. A/51/10 (1996).

norms is treated as an international concern whether this occurs in time of war or peace, internally or extra-territorially. Therefore, not all human rights issues fall under the jurisdiction of the International Criminal Court. The jurisdiction of the ICC will be limited to only the most serious crimes of concern to the international community. These, according to the Rome Statute are genocide, war crimes, aggression and crimes against humanity. Crime against humanity has been held to be intrinsically more serious than war crimes, for they are deemed to be directed against the whole of humanity as its victim, thereby injuring a greater interest than war crimes limited towards a restricted group of people. Apart from its classical content such as murder, extermination and torture, it now includes sexual offenses such as rape, sexual slavery, enforced prostitution and forced pregnancy, forced sterilization and other form of sexual violence of comparable gravity.⁵ These crimes whether committed in time of war or a period of brief upheaval or during peace time, are equally punishable as such. The drive to establish interstate-universal jurisdiction is based first on the fact that some crimes are so heinous that they offend the interest of all humanity—imperiling civilization itself.⁶ This entitles any state to punish it on behalf of the rest of mankind. Also, most massive and widespread atrocities are often executed with open or tacit support of those in control of states instrumentalities of power. This makes it difficult if not impossible to prosecute the perpetrators without an external intervention.

5. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, arts. 5–8, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998).

6. Kenneth C. Randal, *Universal Jurisdiction under International Law*, 66 TEX. L. REV., 785, 803 (1988); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The international human rights law, serve as a moral imperative for all nations. Those specially selected norms which fall under *jus cogens*, *erga omnes* and international crime entitles each state even when their citizens are not directly involved, and even if the offense falls outside the states territorial jurisdiction to prosecute. In *Filartiga v. Pena-Irala*, 630 F. 2d. 876 (2d. Cir. 1980), a Paraguayan police officer who participated in torturing to death a citizen of Paraguay was sued under the Alien Torts Acts Claim by the relatives of the deceased. The U.S. Court of Appeal for the 2nd Circuit in assuming jurisdiction said that “the torturer has become—like the pirate and slave trader before him—*hosti humani generis*, an enemy of all mankind.” *Id.* at 881. See also Attorney General of the Government of Israel v. Eichman, 36 I.L.R 18, 26–57 (Dist. Ct. Jerusalem, 1961). The abduction from Argentina and prosecution in Israel of Eichman was based on the universal jurisdiction applied to *erga omnes* norms of which genocide, crime against humanity, which Eichman as a Nazi henchman participated in, are part of. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141–43 (1997).

III. JUDICIAL ENFORCEMENT OF INTERNATIONAL OBLIGATIONS⁷

Conceptually, all international courts and tribunals share some basic elements with national judicial organs. These are independent existence and institutionalization of the organs, creation through a legal or political instrument, laid down rules of procedure, duty of interpretation and application of the law.⁸ But in nearly every other respects international courts differ from national legal institutions.

First is the issue of jurisdiction of the respective international court or tribunal to handle the matter, and second is the problem of observation and enforcement of the court's decisions. For example, the International Court of Justice (ICJ) generally accepted as the World Court, does not have mandatory jurisdiction over any matter or party unless parties expressly submit to it. This non-mandatory jurisdiction can bring about serious deadlock as seen in the Nicaragua case, where the USA, after submitting to the jurisdiction of the ICJ, refused further participation when judgment was rendered. The ICJ reiterated also in the Monetary Gold case that it cannot adjudicate on the international responsibilities of states without their consent.⁹

Criminal justice which involves the full force of state power is intricately intertwined with sovereignty. States both great and small are for various reasons generally reluctant to cede any of its powers in this area to another entity, more so when this will mean submitting to an external judicial organ with supranational powers. The stronger states do not want any limitation on their powers, while the smaller, weaker ones such as African states fear external control or interference in their domestic affairs. The International Criminal Court (ICC) tried therefore to overcome this hurdle by assuming compulsory or

7. For an extensive coverage of enforcement of international obligations, see OBASI OKAFOR-OBASI, *THE ENFORCEMENT OF STATE OBLIGATIONS TO RESPECT AND ENSURE HUMAN RIGHTS IN INTERNATIONAL LAW* 74 (2003). Other tools available in international law for the enforcement of states obligations range from coercive measures such as threat of, or actual military intervention, use of force short of war, reprisals and countermeasures. Intervention is mostly effective if it is embarked upon by a multilateral and not unilateral force, and received a prior recommendation by the Security Council. Non-violent methods of enforcement are economic pressure such as sanctions and trade embargoes, breach of diplomatic relations which protests actions of a particular state, contentious judicial proceedings, which could end in imposition of fines, forfeitures or reparation for the victim. There is also the very subtle but not ineffective method, publicity, intended to hurt the international image of the state involved in atrocities.

8. Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/ or Specialized Jurisdiction*, in *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION, AN INTERNATIONAL SYMPOSIUM* 307 (1974).

9. Corfu Channel Case, Merits, 1949 I.C.J. 4-35 (Apr. 9); Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr.; U.K. v. U.S.) Preliminary Question, I.C.J. Reports (1954), 19, 35; see also Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, T.S. No. 993.

mandatory jurisdiction over cases involving any state that has ratified the Rome Statute. This compulsory jurisdiction is an attempt to avoid uncertainties and secure the cooperation of states parties in strengthening world peace and security.

Though this compulsory jurisdiction makes the court easily accessible, it has inadvertently triggered suspicion as to which extent it can use this power to jeopardize or limit the fundamental interests of any state. Behind the reluctance of the U.S. government, for example, to ratify the statute, is the fear that its service men could be targeted for frivolous and mischievous prosecution intended to embarrass the only surviving super power. But this fear is unfounded, because the ICC is targeting only international criminals of all nations, and not from any particular country. Nonetheless, the supranational application of the decisions of the ICC gives a hint of the primacy of international law and the establishment of universal criminal jurisdiction which can, at least legally, limit the global ambition of some powerful states.

However, this so-called compulsory jurisdiction is apparently not as effective as it seems. In reality, the ICC does not have automatically inhering powers to assume jurisdiction over any case. Original and automatic jurisdiction belongs to the state whose subjects are either perpetrators or victims of the offense, or the state in whose territory the offense was committed. Before the ICC can assume jurisdiction, the state concerned must decline to prosecute, lack the resources to prosecute, formally hand over the matter to the ICC for prosecution, or when the Security Council requests it, to investigate a particular situation and prosecute. Theoretically, it is therefore possible for the ICC to exist for a very long time without entertaining any single case. If the Democratic Republic of Congo (DRC) and Republic of Uganda had the powers and resources to apprehend and prosecute the rebels causing the mayhem in their countries, they would not have requested the ICC for help in this regard. They would have gone ahead and prosecuted to the relief of the world those behind the atrocities in their countries.

The mere invitation and lodging of these complaints before the ICC alone do not indicate a wide acceptance of the legitimacy of the court, or a positive disposition towards it by all states. This cord might well be struck if the court handles these two initial cases well. The court itself, critics and protagonists remain apprehensive of the outcome. If it fails to deliver, its death knell might well be sounded, as critics will point at the flaws, possible biases, and the difficulties of erecting on a permanent basis an effective international criminal jurisdiction. But if it presents itself well, it will earn the trust of all nations and could be flooded with more cases. As we all know, atrocities deserving of the attention of the court abound all over the world today. These first two cases if properly handled will not only form the reference point for future cases before

the court, but may even encourage national courts to cooperate with it in their efforts to combat international crimes.

IV. WHO MAY BE PROSECUTED BEFORE THE ICC?

Even though classical international law recognized only states as subjects, the Nuremberg and Tokyo Military Tribunals laid the present foundation of directly burdening individuals with criminal responsibility even when acting on behalf of their states. That a state can commit a crime was affirmed by the Nuremberg tribunal. But a state as an abstract entity, such as Germany, cannot be put in the witness box, prosecuted, convicted, sentenced to prison term, or an entire population executed, just to punish an act of state considered an international crime.¹⁰ Therefore the most prominent individuals or officials seen as the extended hands of the state are prosecuted and punished, thereby reviving the issue of the place of the individual in international law. Other ad hoc international criminal tribunals like Yugoslavia, Rwanda and Sierra Leone have followed the same pattern of placing international criminal responsibilities on individuals. This is a confirmation of the powerful statement by the Nuremberg tribunal that, crimes against international law are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹¹

Traditionally, the denial of subject status to individuals in international law makes criminal prosecution of states difficult if not impossible.¹² But the acceptance of the individual and other non-state actors as subjects of modern international law has eased the process of punishing any international offense committed. This is because, whether seen as an act of state or as a result of individual volition, whenever a crime is committed, a particular person or a group of persons that are identifiable and directly connected with the crime would be held responsible. Also, the need to combat international terrorism, hijacking of airplanes, drug trafficking, international money laundering have helped to declare individuals who commit these offenses which have

10. Alain Pellet, *Can a State Commit a Crime? Definitely Yes*, in STATE RESPONSIBILITY IN INTERNATIONAL LAW 425 (Rene Provost ed., 2002).

11. However both Nuremberg and Tokyo Military Tribunals have been criticized as not being international or truly representative at all. They were perceived as "victor's courts" for the purpose of prosecuting the enemy and rendering only "victor's justice." KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPATIBILITY AND COOPERATION*, COPENHAGEN 12 (2000). The International Criminal Tribunal for Yugoslavia sitting at The Hague has convicted and sentenced to various terms of imprisonment, Edmovic and Tadic, for offences ranging from war crimes, genocide to crime against humanity. The International Criminal Tribunal for Rwanda sitting in Arusha (Tanzania) has convicted also for similar offences and sentenced to various terms of imprisonment Jean Paul Akeyesu and Jean Kambanda.

12. The most convenient and effective tool for punishing renegade states was resort to a devastating war, either by a more powerful state or a coalition of states against the recalcitrant state.

cross-border effects, as *hosti humani generis*—common enemies of mankind. And they could be prosecuted by any court on behalf of the international community or by an international tribunal.

However, placing an individual before a truly international court such as the ICC helps to avoid the insinuation of victor's justice. Even after a bloody internal ethnic war or crisis as witnessed in Rwanda and the DRC, an international judicial organ detached from the emotions and sentiments of the situation leading to the crisis will be more able to be neutral and procedurally just than a national court that is more likely to be vindictive. At least the ICC cannot hand down a death sentence because the statute forbids it from doing that even if it is inclined to. It would be more relied upon in establishing accountability.¹³

With the acceptance of states, individuals and other non-state actors such as rebel groups as subjects of international law, it has been possible for President Museveni, acting on behalf of Uganda, to request for the criminal investigation of a rebel group known as the Lords Resistance Army. This group has been ravaging his country and causing mayhem and brigandage with the aim of installing a Christian government based on the Ten Commandments. On the same note, the young President Kabila had also earlier requested the investigation and prosecution by the ICC of those who in the course of the long drawn war in the Congo committed genocide, war crimes and crimes against humanity, including those behind the recent massacre of about 200 refugees at a camp near DRC's border with Rwanda. However, the ICC will be investigating only crimes allegedly committed since its establishment in July 2002. Troops from all countries that participated in the five year war, especially those from the DRC, Rwanda and Uganda, and the rebel groups, such as the Congolese Liberation Movement led by Jean Pierre Bemba who are alleged to have committed massive rapes, forced labor and cannibalism in the northeastern Ituri province will be targeted in the investigation.¹⁴ Because of the widespread nature of the offenses, the duration and intensity of the crimes, most citizens while accepting this limited intervention by the ICC regret the non-retroactive application of the ICC statute. They complain that the period covered is too limited and narrow, and will enable some big fish to escape the drag net. Nonetheless, the punishment of even just a handful of the most visible perpetrators of these atrocities will serve, if a symbolic purpose of assuaging the feelings of their victims who want to see justice done.

13. Michael Reisman, *Scenarios of Implementation of the Statute of the International Criminal Court*, in *THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY*, BURLINGTON 281 (Marurio Politi & Giuseppe Nesi eds., 2001).

14. Daniel Balint Kurti, *Congo Looks to International Court for Justice*, ASSOCIATED PRESS WIRE, June 2, 2004.

How these will play out will be both interesting and revealing. Traditionally, prosecution of war crimes has always been directed against individuals acting on behalf of the government. But in these two cases, governments that have consistently been accused of committing atrocities are now accusing individuals and organizations (rebel groups) of wreaking havoc in their territories and thus deserving of international investigation, prosecution and punishment. This is a new development in international criminal justice. The absence of a global police force or an international prison facility requires the cooperation of states in the implementation of the sentences. The experiences of the ad hoc tribunals from Nuremberg, but particularly Yugoslavia and Rwanda will be immensely beneficial to the ICC which is established to do the same work, but only on a permanent basis. Most convicts of the Rwanda tribunal are serving terms in the Arusha prison facility based on an international agreement with Tanzania.

V. COMBATING AFRICAN HUMAN RIGHTS CRISIS

Unfortunately, recent wars in Africa manifested on a grand scale all the atrocities punishable under the Rome Statute. In Rwanda, Sierra Leone, Liberia, DRC and Uganda, the gory story is the same. People have been maimed, mutilated, tortured, cannibalized, and women raped en masse, ignoring all known rules of war. Both government and rebel troops are equally guilty of these atrocities.

While helpful and complimentary, the ICC is not the best tool for combating such massive crimes, which it has set out to enforce. As the ICC does not have its own police, military or law enforcement agents, it therefore will be relying on the assistance and cooperation of the states that have ratified its statute in order to function effectively. Because of these institutional defects, the court will have to work through the states in conducting investigations, obtaining evidence and apprehending suspects. This makes it over dependent on the states in order to function and is likely to be delaying the prosecution of suspects, and delaying justice.¹⁵ To reach a point whereby the ICC is called upon to intervene is indicative of how bad a situation has become. Like curative medicine, judicial enforcement of human rights arises after an injury has occurred. But prevention as we all know is better than cure. In Africa, addressing the factors that lead to these widespread human rights abuses will work better than prosecuting a handful of the most visible renegades as symbolic of justice being done.

15. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 250 (2002).

The effective enforcement of the judgment of the ICC requires consent, complimentary efforts and cooperation of all states parties. This cooperation should not be seen only in terms of states making available their prison facilities for the detention of convicts. It should extend to helping Africa tackle its urgent political, social and economic problems which persistence sustain the long drawn African crisis that lead to these human rights abuses.

In spite of the nominal provision of fundamental human rights in virtually all the constitutions of African states, violations persist with impunity. Observably, the human rights situation has been in continuous deterioration since the different countries gained their independence. Wars, civil strife, ethnic tension and clashes have all combined to cost Africa more than twelve million lives in the last four decades. Factors responsible for these include, arbitrary colonial boundaries that lumped together groups without consideration of their different social and cultural differences, thus breeding distrust, tension and intermittent violent clashes and civil wars. The absence of a reliable and functional democratic structure and over concentration of powers and resources on the central government, by excluding certain regions makes them to resort to agitation for autonomy, inevitably leading to violent clashes. In Africa, the root of all massive human rights violations is political, and hardly judicial. Thus, the solution requires not a judicial but a political means which takes into considerations factors such as restructuring, political and economic empowerment of a certain disadvantaged class or group. Unless the political, social and cultural issues are addressed, the courts, including the ICC will not be able to provide a lasting solution to the different abuses we are now witnessing in Africa.

During the trial of Jean Paul Akeyesu by the International Criminal Tribunal for Rwanda, the evidence gathered revealed that there was a premeditated intention, a centrally organized and meticulously executed plan to annihilate a particular group of people—the Tutsis of Rwanda. And within few months of the upheaval, close to a million people were killed. The Nigeria-Biafra civil war claimed approximately the lives of more than three million Igbo, mostly women and children.¹⁶ From the coastal plains of Sierra Leone, through the tropical forests of the Congo to the mountains of Uganda, millions have perished because of unresolved political struggles. Neither the conviction of Akeyesu by the Rwandan tribunal nor the prosecution of all those who bear

16. Aside from the simmering political tension in Nigeria in the mid-sixties, the immediate precursor of the civil war was the general anti-Igbo uprising in the Northern part of the country which, sweeping the region as a wave claimed the lives of about 100,000 Igbo and other indigenes of the then Eastern Region. Several thousands more were wounded and property worth millions of Pounds destroyed. There were no arrests and no prosecution. This led to a strong feeling that the Federal government tacitly or inadvertently condoned the genocidal act, or was incapable of protecting the lives and property of its citizens. The feeling of insecurity among Easterners, led to an agitation for a safer haven, which the political leaders of the then Eastern region of Nigeria, called Biafra. Soon after, the Nigeria-Biafra civil war broke out.

the greatest responsibility for the atrocities in Sierra Leone such as John Koroma and Foday Sankor can effectively prevent a reoccurrence of similar situation in the future. These issues require political solution. The solution will start by institutionalizing an effective and functioning constitution, which will not only guarantee fairness in the election of the leaders, but also check and balance the powers of different governmental organs and prevent abuse. It will regulate the relationship between the government and the people, and also safeguard a meaningful participation of different ethnic groups in their government and give them a sense of belonging. Observation and respect of human rights is just one of the many obligations which customary international law as well as conventions and judicial decisions have placed on states, and by extension of the third party effect of fundamental human rights¹⁷ also on private individuals. For example, as the fundamentals of human rights continue to flourish in Europe, there is less and less likelihood of witnessing similar upheaval that jolted the continent half a century ago and brought about Nuremberg and Tokyo Military Tribunals.¹⁸

17. Human rights as a right, privilege and immunity, which a state owes its subjects, run vertically between the state and the subjects. However, there is a horizontal dimension to the enjoyment of these rights which is known as the "third party effect" of fundamental human rights. This is a concept existing in German constitutional mechanism and known as *Drittwirkung*. It is a process whereby private individuals, just like the state are burdened with the duty to respect and observe the fundamental human rights of others. Ordinarily, most human rights, especially of the first generation, are expressed in negative terms whereby the state is only required to refrain from intruding into the private sphere of its subjects. It has been observed, that even where the state restrains itself from breaching a citizens fundamental human rights, a private person can violate those rights in a way that the state could have done. Thus, the state is called upon not only to respect the rights of its subjects, but also to prevent private individuals from violating those rights, and will be held responsible if it does not create a condition to prevent the violation of individual rights by private persons who may not even be acting as agents of the state.

18. The inadvertence of Versailles to provide adequate support for the fragile democratic movement in Germany after the First World War, the total absence of an economic recovery program and the frontal umbrage caused by the punitive conditions of the armistice laid the unanticipated foundation for the Second World War. Wisely avoiding the mistakes of the past, in Europe, the prosecution and conviction of the principal Nazi officials was immediately followed by heavily financed economic recovery program for Germany—The Marshall Plan. In addition, there was a conscious de-nazification of German political and legal systems through deeply entrenched democratic process. The Weimar Constitution of 1919 was replaced with the German Basic Law of 1949 (*Grundgesetz*) with its elegant but serious provisions for safeguarding the dignity, rights and freedoms of every person. These political and economic developments are more impacting in securing human rights and preventing future tragedies than the token imprisonment and execution of few diehard Nazi henchmen. Today, neither Europe nor the rest of the world will by any stretch of the imagination have reason to fear another Auschwitz, Dachau or Treblinka, or have angst that someday, someone in Berlin, would march with military boots to Paris in order to settle a political difference by force. The flowering of rule of law and democracy in Europe today has made such irredentist behavior both anachronistic and unfashionable. Democracy and economic progress are just the best tools for securing human rights. If similar efforts, as described above, are duplicated in Africa with the help of the international community, a new day for human rights will surely dawn on the continent.

While democracy may not be the panacea for all human rights abuses, it has at least presented itself as the best form of government to check dictatorial inclinations of leaders and helps at least prevent a society from descent into wide spread human rights abuses. Democracy has the best enduring tool to resolving every political issue, by taking into consideration each group's opinion, hopes and fears. Therefore, while the ICC will remain relevant in prosecuting the most visible perpetrators of human rights atrocities that touch on and concern the interest of the international community, more attention should continue to be paid to the factors that trigger off the abuses in the first place. Professor Aka, in his proposal for resolving Africa's conflicts that cause these abuses listed a comprehensive human rights model based on democracy as a political system and integrating human rights education, economic progress, political restructuring, attention to collective or group rights, and necessity for external help as constituent elements.¹⁹ Any realistic observer of Africa for the past four decades will find no problem agreeing with this conclusion.

19. Aka, *supra* note 1, at 208.

GLOBAL RESPONSES TO TERRORISM AND NATIONAL INSECURITY: ENSURING SECURITY, DEVELOPMENT AND HUMAN RIGHTS

*C. Raj Kumar**

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"Terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights, the rule of law; rules of

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war that protect civilians, tolerance among peoples and nations; and the peaceful resolution of conflict. Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law order".¹

I. INTRODUCTION

The terrorist attacks in London² and Egypt³ and other parts of the world have once again reinforced the attention of the international community on the problem of "terrorism."⁴ Earlier, the September 11th attacks in New York and Washington D.C. generated global attention to respond to terrorism and countries launched a bevy of responses, including passing new laws that would

1. The Secretary General, *Report of the Secretary General's High-level Panel on Threats, Challenges and Change—A More Secure World: Our Shared Responsibility*, at 47, ¶145, U.N. Doc A/59/565, available at <http://www.un.org/secureworld/> (last visited Aug. 6, 2005) [hereinafter *More Secure World*].

2. See *London Under Attack*, N.Y. TIMES, July 8, 2005, at A22. See also Press Release, Security Council, Security Council Condemns 'Barbaric' London Terrorist Attacks, Unanimously Adopting Resolution 1611, U.N. Doc SC/8438 (July 7, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8438.doc.htm> (last visited Aug. 6, 2005).

3. See *Security Council Condemns Weekend Terrorist Bombing in Egypt*, U.N. NEWS CENTRE, July 27, 2005, <http://www.un.org/apps/news/story.asp?NewsID=15183&Cr=terror&Cr1> (last visited Aug. 6, 2005).

4. This article does not go into a detailed discussion on the definition of terrorism. There may be greater consensus for the definition of terrorism given the U.N. Secretary General's report, "In larger freedom: towards development, security, and human rights for all," in which he observed: "I endorse fully the High-level Panel's call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act." The Secretary-General, *Report of the Secretary-General — In Larger Freedom: Towards Development, Security and Human Rights For All*, at 26, ¶ 91, U.N. Doc. A/59/2005 (Mar. 21, 2005, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement> (last visited Aug. 6, 2005) [hereinafter *In Larger Freedom*]. But in his report, he has also observed, "It is time to set aside debates on the so-called 'State terrorism'." *Id.* Even to support the definition of terrorism that is proposed by the Secretary General, I don't think this statement is necessary. It is important to recognize that experience has demonstrated that states have used anti-terrorism laws to suppress dissent and to discourage democratic movements and also to resist human rights accountability. These activities of suppression may sometimes rise to the level of "State terrorism" and/or "State-sponsored terrorism" when the violence committed by the state apparatus reaches alarming levels and innocent civilians have been victimized. But the question is whether these acts should come under the ambit of the definition of terrorism or if they should remain within the existing frontiers of international law. This is a different debate not addressed in this article. For further reading, see Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357 (2003).

strengthen the anti-terrorism legal framework, tightening immigration policies⁵ and raising the bar of suspicion on allegedly disloyal persons.⁶ These laws have had wide implications for human rights and civil liberties.⁷ There are signs that even academic freedom is threatened due to the war on terror.⁸ A number of writings on this subject are concerned with the consequences of anti-terror laws on human rights.⁹ These writings have pointed out how the so-called "war on terror" has systematically compromised human rights and undermined international law and how they can be resisted.¹⁰ The grave examples of breach of international law and international human rights law to contain terrorism include, but are not limited to, the detention of people in Guantanamo Bay¹¹ who are suspected by the U.S. to be terrorists and also the systematic abuse of prisoners in Abu Ghraib.¹² Even more recently, questions concerning the rendition of alleged terrorists to countries where they may encounter abuse or torture and the jailing of terrorists by the US in Europe have caused controversy.¹³

5. See generally Raquel Aldana & Sylvia R. Lazos Vargas, "Aliens" In Our Midst Post-9/11: Legislating Outsideness Within the Borders, 38 U.C. DAVIS L. REV. 1683 (2005).

6. See Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).

7. See generally Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89 (2001).

8. See Michael A. Olivas, *The War on Terrorism Touches the Ivory Tower—Colleges and Universities After September 11: An Introduction*, 30 J.C. & U.L. 233, 235–6 (2004).

9. See Editorial, *Terrorism and Human Rights*, EUR. H. R. L. REV. 1, 1–6 (2005). See also Tracy Topper Gonzalez, *Individual Rights Versus Collective Security: Assessing the Constitutionality of the Patriot Act*, 11 U. MIAMI INT'L & COMP. L. REV. 75 (2003).

10. For an important article on the subject, see Harold Hongju Koh, "The Spirit of the Laws", *Focus: September 11, 2001—Legal Response to Terror*, 43 HARV. INT'L L.J. 23, 29 (2002). See also Upendra Baxi, *The "War on Terror" and the "War of Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law - Prefatory Remarks on Two "Wars"*, 43 OSGOOD HALL L. J. 7 (2005).

11. See Dianne Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L. L. 263 (2004).

12. DEBORAH PEARLSTEIN, *HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH: INVESTIGATING U.S. ABUSES IN THE WAR ON TERROR* 1 (2004).

13. For further reading, see THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND CENTRE FOR HUMAN RIGHTS AND GLOBAL JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO EXTRAORDINARY RENDITIONS* (2004), <http://www.nyuhr.org/docs/TortureByProxy.pdf> (last visited 8 Dec. 2005).

Human rights NGOs like Amnesty International¹⁴, Human Rights Watch¹⁵ and Human Rights First¹⁶ (earlier known as Lawyers Committee for Human Rights) have written and compiled numerous reports on this subject.¹⁷ Even at the U.N., the Office of the High Commissioner for Human Rights has recognized that the war on terror should not disrespect human rights and that in our zeal and enthusiasm to fight terrorism and to protect national security¹⁸, human rights and civil liberties¹⁹ cannot be compromised.²⁰ There is, of course, another issue that is not well covered in media or legal literature- civilian casualties in Afghanistan and Iraq as a consequence of the war on terror. The civilians reported killed by military intervention in Iraq, minimum: 23,456 and maximum: 26,559. These figures grossly demonstrate the futility of war and large scale victimization that it effects on the families of the civilians who are killed, which, in military terms, is called "collateral damage."²¹

To further add to the existing discourse, the U.N. Secretary General constituted a High-level Panel on Threats, Challenges and Change, which submitted its report in late 2004 known as "A More Secure World: Our Shared Responsibility," in which the problem of terrorism has been further outlined and a number of recommendations have been given.²² The Secretary General, while preparing for the Meeting of the Heads of State and Government that was held

14. Amnesty Int'l, Rights at Risk, Amnesty International's concerns regarding security legislation and law enforcement measures, AI Index ACT/30/001/2002, Jan. 18, 2002, available at <http://web.amnesty.org/library/index/engACT300012002?OpenDocument> [hereinafter Rights at Risk].

15. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE: A HUMAN RIGHTS WATCH BRIEFING PAPER FOR THE 59TH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS 10-11 (2003), available at www.hrw.org/un/chr59/counter-terrorism-bck.pdf.

16. DEBORAH PEARLSTEIN & PRITI PATEL, HUMAN RIGHTS FIRST, BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS (2005).

17. See generally Amnesty Int'l, United States of America: The threat of a bad example: undermining international standards as "war on terror" detentions continue, AI INDEX AMR/51/114/2003, Aug. 19, 2003, available at <http://web.amnesty.org/library/Index/ENGAMR511142003>; see also Amnesty Int'l, United States of America: Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention, AI INDEX AMR 51/0931/2004, June 16, 2004, available at <http://web.amnesty.org/library/Index/ENGAMR510932004?open&of=ENG-USA>.

18. See Sandra Coliver, *Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 20 HUM. RTS. Q. 12 (1998).

19. See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, reprinted in 7 HUM. RTS. Q. 3 (1985).

20. See generally David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996).

21. For further information, see Iraq Body Count Homepage, <http://www.iraqbodycount.net> (last visited Aug. 6, 2005).

22. *More Secure World*, *supra* note 1.

in New York in September 2005 to commemorate the fifth anniversary of the passing of the Millennium Declaration, submitted a report to the General Assembly in March 2005 entitled "In Larger Freedom: Towards Development, Security and Human Rights for All."²³ However, this was not sufficiently followed up in the outcome of the Millennium Summit in September 2005.²⁴

The present article firstly provides an overview of how both terrorism and global efforts to contain it violate human rights, undermine the rule-of-law, and systematically destabilize governments, societies and people. This part will focus on the problem and the need for the international community to seriously address terrorism with a view to solving it or at least reducing the incidence of attacks.²⁵

Second, the article provides a critical appraisal of the report of the U.N. High-Level Panel and its potential use to garner greater support from the international community for responding to the threats in a unified and comprehensive manner.

Third, the article will critically examine the report of the U.N. Secretary General, "In Larger Freedom: Towards Development, Security and Human Rights for All," presented to the U.N. General Assembly in March 2005 with a view to understanding its broader implications for ensuring security, promoting development, and protecting human rights.²⁶ The key question is whether it has successfully challenged the contemporary discourse on the "war on terror"²⁷ and "national security strategies", or merely reinforced these statist notions by over-emphasizing the role of the state.

Fourth, the article examines the need for understanding the problem of terrorism in a holistic manner so that human security,²⁸ human development, and human rights are all put into the rule-of-law framework.²⁹ This means that all strategies that are intended to ensure collective security³⁰ and development

23. *In Larger Freedom*, *supra* note 4.

24. See 2005 Word Summit Outcome, Sept. 15, 2005, U.N. Doc A/60/L.1, available at <http://www.globalpolicy.org/msummit/millenni/2005/0913thirteenth.pdf> (last visited Dec. 8, 2005).

25. See Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror"*, 4 SCHOLAR 209 (2002).

26. Priyanka Upadhyaya, *Human Security, Humanitarian Intervention and Third World Concerns*, 33 DENV. J. INT'L L. & POLY 71 (2004).

27. See Upendra Baxi, *The "War on Terror" and the "War of Terror": Nomadic Multitudes, Aggressive Incumbents and the "New" International Law*, 43 OSGOOD HALL L.J. 7 (2005).

28. Roland Paris, *Human Security: Paradigm Shift or Hot Air?*, 26.2 INT'L SEC. 87-102 (2001).

29. See ELLEN SEIDENSTICKER, HARVARD UNIVERSITY, KENNEDY SCHOOL OF GOVERNMENT, HUMAN SECURITY, HUMAN RIGHTS, AND HUMAN DEVELOPMENT (2002), available at <http://www.humansecurity-chs.org/activities/outreach/0206harvard.pdf> (last visited Aug. 6, 2005).

30. Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1996).

ought to be within the rule-of-law framework.³¹ The rule-of-law framework should be applicable both in the domestic as well as international arenas.³²

Fifth, the article will examine the role of international institutions, including the Office of the High Commissioner for Human Rights, in developing responses to terrorism³³ and whether the U.N. Secretary General's proposal of a smaller Human Rights Council to replace the present bigger Human Rights Commission can help in formulating more effective strategies. This section will also examine whether there is a need for a paradigm shift³⁴ in responding to terrorism, particularly when the responses ought to be within the rule-of-law framework so that they do not generate further insecurity in certain communities. This may further exacerbate the threats leading to exploitation of these situations by people who are determined to commit violence against civilians to fulfill whatever goals, political or otherwise, they have in mind.³⁵ Sixth, the article examines the role of non-governmental organizations and domestic and international civil society movements in relating security to development and human rights.

The article recognizes that terrorism is a human rights violation. The responses to terrorism should be steadfast and the international community should be determined.³⁶ The international legal framework for counter-terrorism efforts needs to be strengthened.³⁷ There is no doubt that there is a real problem here.³⁸ Unfortunately, global responses to terror threats have not made the world a more secure place. Rather, it may be argued that countries have become far less secure than they were when the worldwide 'war on terror' began. Even a 2003 report by Amnesty International had observed that the "war on terror" has made the world a more dangerous place and created divisions which make conflict more likely.³⁹ And definitely, it is clear that the

31. See generally Ved P. Nanda, *Preemptive and Preventive Use of Force, Collective Security, and Human Security*, 33 DENV. J. INT'L L. & POL'Y 7 (2004).

32. See generally Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. (2002).

33. Human Rights and Terrorism, C.H.R. Res. 2004/44, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., U.N. DOC. E/CN.4/RES/2004/44 (2004).

34. See Diane P. Wood, *The Rule-of-Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003).

35. See generally Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461 (1992).

36. See generally Chantal de Jonge Oudraat, *Combating Terrorism*, 26 WASH. Q. 163 (2003).

37. See generally M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83 (2002).

38. See The Secretary-General, *Report of the Secretary-General on Measures to Eliminate International Terrorism*, delivered to the General Assembly, U.N. DOC. A/48/267/Add.1 (Sept. 21, 1993).

39. *Warning Over War on Terror*, BBC NEWS, May 28, 2003, available at http://news.bbc.co.uk/2/hi/uk_news/politics/2943192.stm (last visited Dec. 8, 2005).

misunderstandings among people belonging to different religions have worsened since then. It is important that the international community take stock of the situation and, as underlined in the U.N. Secretary General recent report, take steps to ensure “larger freedom.”⁴⁰ There is a need for a paradigm shift in the approach to responding to terrorism and it ought to include the need for development policies as well as human rights protection, all within a rule-of-law framework.⁴¹ This is the only way by which we can begin to solve the problem.⁴² Given the fact that roots of the problem of terrorism lies in certain historical and political issues that have survived for many years and have been systematically manipulated by people with vested interests, the international community needs to be mindful of the challenge. This is not just a law enforcement issue- even though some law enforcement strategies can help in preventing and investigating terrorism-related crimes. The core problem is much more than that, and this is where the question of “larger freedom” assumes significance. Larger freedom includes the need for our societies to move towards guarding themselves from threats to human security that go beyond the problem of terrorism—risks posed by poverty and other forms of impoverishment, unemployment, corruption and lack of state capacity to manage natural disasters and infectious diseases, lack of sincere efforts to tackle global warming and climate change etc.

II. OVERVIEW OF THE PROBLEM OF TERRORISM IN THE GLOBAL CONTEXT

Terrorism is a serious problem that has affected numerous countries for many years. However, the problem of terrorism received international attention and serious global scrutiny only after the 9/11 attacks in New York and Washington D.C. In fact, this sudden attention to a problem that has been prevailing for many years has been the subject matter of criticism by some countries and its people.⁴³ There is an emerging global consensus that terrorism affects people in a serious manner and violates the freedom from fear. The randomness of a tube station or roadside bomb has a very powerful scare-

40. See *In Larger Freedom*, *supra* note 4.

41. See Robert S. Summers, *The Principles of the Rule-of-Law*, 74 NOTRE DAME L. REV 1691 (1999).

42. For understanding the official approach of the U.S., see WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030214-7.html> (last visited Nov. 16, 2005).

43. For example, the problem of LTTE in Sri Lanka and the violence in Kashmir are glaring examples of attacks against civilian population by armed groups engaging in a political struggle. See generally U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—SRI LANKA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41744.htm> (last visited Nov. 16, 2005).

message attached- practically anyone who is unlucky to be present at the spot of attack can be killed or seriously injured. A society that fears cannot achieve the kind of goals its people want to achieve. Whenever there is a terrorist attack, victimizations take place.⁴⁴ The direct consequences of terror attacks are: one, terrorist attacks result in victimization of the people who get killed, injured or otherwise affected by the actual attacks themselves; two, the family members of those victims of terror attacks are also affected because of their loved ones being directly involved; and thirdly, the society in which the terrorist attacks took place becomes a victim whereby people who live in that society begin to live with a sense of fear and a lack of freedom to pursue their goals.

Some of the indirect consequences of terror attacks are: first, the contemporary responses to the problem of terrorism has been to strengthen the law enforcement and intelligence machinery so that stringent measures are imposed on society, including passing of draconian laws that violate human rights, civil liberties and compromise privacy rights; second, the occurrence of racial profiling and hate crimes against people belonging to certain religious and racial groups;⁴⁵ third, rule-of-law is undermined both domestically and internationally due to certain responses adopted by governments with a view to ensuring national security, including use of torture and other extreme measures in interrogating suspects; and fourth, development takes a back seat.

Once a terrorist attack takes place in a country, regardless of the human consequences of these attacks, the entire preoccupation of the legislative, executive, and the judicial apparatus of a country tends to focus on this problem. This is because terrorism challenges the state's legitimate monopolization of violence and threatens its claims to be the protector of citizens. Micro and macroeconomic problems, poverty in poor countries, third world debt, and even other major issues that affect humanity at large, like global warming and climate change, tend to become secondary, and resources that would have been otherwise directed at solving these issues are diverted towards fighting terrorism. Sadly, the amount of resources (financial and human) that are put into tackling the problem of terrorism have not even closely matched the results gained in terms of ensuring greater security. Sometimes, the strategies used to fight terrorism may actually incite greater threats. While it is possible that many potential terrorist attacks may have been averted, given the fact that the approach has not helped in providing a sense of greater security, there is a need

44. The responses to terrorism by the law enforcement agencies also produce victimization. For example, the world witnessed the shooting of an innocent Brazilian electrician in London mistaken to be a terrorist suicide bomber. See Glenn Frankel, *Man Shot Dead by British Police Was Innocent Brazilian Citizen—Bystander Mistaken for Suspect in Failed Bomb Attacks*, WASH. POST, July 24, 2005, at A24, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/23/AR2005072300987.html> (last visited Sept. 30, 2005).

45. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

for a serious reassessment. The possibility that anti-terror crusades enrich and fortify conservative elements that thrive on real and imagined threats makes this a complex issue of misappropriation of causes by vested interest groups.

There is also a tendency to label acts of terrorism, at times, in a whimsical manner depending upon the country in which such acts took place or the alleged organization or individual who carried out these attacks. The problem becomes even more acute when one of the permanent members of the U.N. Security Council is involved. This kind of labeling of acts of violence against civilian population as "terrorist acts" does not go well with countries that are not economically and politically powerful and there is a feeling of disenchantment centering on whose lives matter more and whose matter less. It is not possible to develop a true global consensus against a problem as serious as that of terrorism until and unless the powerful countries take stock of their policies and address these issues in an objective and fair manner.

Unfortunately, the so-called "war on terror" that was pursued in Afghanistan⁴⁶ and Iraq⁴⁷ has brought with it problems of legitimacy of humanitarian intervention⁴⁸ and also the legality of the Iraq war, prompting the U.N. Secretary General Mr. Kofi Annan to call the Iraq war "illegal."⁴⁹ Multilateralism cannot work selectively and hence, the global war on terror is also not working effectively. Professor Ramesh Thakur, Senior Vice Rector of the United Nations University and Assistant Secretary General of the U.N., observed quite rightly that: "...Washington cannot construct a world in which all others have to obey universal norms and rules, while it can opt out whenever, as often, and for as long as it likes on such norms concerning nuclear tests, land mines, international criminal prosecution, climate change, and other regimes."⁵⁰ Double standards in world affairs have reached an all-time high in the current unipolar system.

It is important to understand that this is an area of law and public policy where law (domestic and international), politics (domestic and international),

46. See generally Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. 533 (2002).

47. See generally Mohammed Ayoob, *The War against Iraq: Normative and Strategic Implications*, in *WARS ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM AND U.S. FOREIGN POLICY* (Thomas G. Weiss et al. eds., 2004).

48. Paust, *supra* note 46.

49. See *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (last visited Nov. 16, 2004); For an interesting article on the human rights implications of the Iraq war, see Michael C. Davis, *Human Rights and the War in Iraq*, 4 J. HUM. RTS. 1 (2005).

50. *Diplomacy's Odd Couple, the U.S. and the UN*, UNUUPDATE (July–Aug. 2002) (The Newsletter of United Nations University and its network of research and training centres and programmes), available at http://update.unu.edu/archive/issue19_2.htm (last visited Sept. 30, 2005).

ethics, and international governance come into contact with each other and the challenge is to bring the common humanity of the international community to address the problem. It is notable that, at least in a rhetorical sense, this common humanity was brought together in passing the Millennium Declaration⁵¹ in 2000.⁵² It is another matter that states have failed to fulfill the commitments that were made and are far from actually fulfilling the Millennium Development Goals (MDGs).⁵³ The intentions and resources of the states to recognize and pursue the MDGs⁵⁴ ought to be put in place.

III. REPORT OF THE UN SECRETARY GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE

The U.N. Secretary General Mr. Kofi Annan constituted a High-level Panel on global security threats and reform of the international system on November 3, 2003.⁵⁵ The panel was "tasked with examining the major threats and challenges the world faces in the broad field of peace and security, including economic and social issues insofar as they relate to peace and security, and making recommendations for the elements of a collective response."⁵⁶ In the Executive Summary to the report, the panel observed that "there are six clusters of threats which the world must be concerned with now and in the decades ahead: war between States; violence within states, including civil wars, large-scale human rights abuses and genocide; poverty, infectious disease and environmental degradation; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime."⁵⁷ The fact that the panel recognized these clusters of threats demonstrated the importance of taking a holistic perspective on threats that are affecting humanity. Further, it also brought to the forefront the need for collective action within the U.N. as the relevance and importance of each of these threats may vary from country to

51. See G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), available at www.un.org/millennium/declaration/ares552e.htm (last visited Sept. 30, 2005).

52. See generally The Secretary-General, *Report of the Secretary-General on the Implementation of the United Nations Millennium Declaration*, ¶ 39, delivered to the General Assembly, U.N. Doc. A/59/282 (Aug. 27, 2004).

53. For a comprehensive understanding the human rights issues relating to the Millennium Development Goals (MDGs), see Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755 (2005).

54. See generally UNITED NATIONS, U.N. MILLENNIUM DEVELOPMENT GOALS, available at <http://www.un.org/millenniumgoals/> (last visited Sept. 30, 2005).

55. *More Secure World*, *supra* note 1.

56. *Id.*

57. *Id.*

country and society to society.⁵⁸ Discussing the policies for prevention of threats, it was quite rightly observed that, "Development has to be the first line of defense for a collective security system that takes prevention seriously. Combating poverty will not only save millions of lives but also strengthen States' capacity to combat terrorism, organized crime and proliferation. Development makes everyone more secure. There is an agreed international framework for how to achieve these goals, set out in the Millennium Declaration⁵⁹ and the Monterrey Consensus, but implementation lags."⁶⁰

The recognition of development as a key issue and as a first line of defense against threats, including terrorism, is significant for a number of reasons. There have been many debates on this issue in the context of understanding the causes of terrorism.⁶¹ Discussing the causes of terrorism, in the chapter on economic factors, Red Robert Gurr observed, "...structured inequalities within countries are breeding grounds for violent political movements in general and terrorism specifically."⁶² The fact of the matter is that development can help in creating more equal societies which are less fertile grounds for breeding terrorism. While lack of development may certainly not be an excuse for terrorist acts, it certainly is a contributing factor. The issue of development cuts across all six clusters of threats mentioned in the report. It has the potential to act as a strong deterrent against all sorts of threats and to provide a collective security system. But the real problem comes when states tend to choose among the threats they perceive to be most urgent from their perspective or, alternatively put, to prioritize them. Any attempts to do such random choosing of the threats, thereby giving more attention to some threats and ignoring others, will ultimately affect the capacity of the international community to develop a collective security system.⁶³ While the thematic representation of the threats and their relationship have been well presented in the report, the report could have also underlined the need for individual states not to engage in choosing

58. See generally, Anne-Marie Slaughter, *Security, Solidarity, And Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619 (2005).

59. See U.N. MILLENNIUM PROJECT, *INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS* (2005), available at www.unmillenniumproject.org/documents/MainReportChapter0Frontmatter-highres.pdf (last visited Nov. 16, 2005).

60. *More Secure World*, *supra* note 1.

61. See generally J.M.B. Porter, *Osama Bin-Laden, Jihād, and Sources of International Terrorism*, 13 IND. INT'L & COMP. L. REV. 871 (2003).

62. ADDRESSING THE CAUSES OF TERRORISM, THE INTERNATIONAL SUMMIT ON DEMOCRACY, TERRORISM AND SECURITY, THE CLUB DE MADRID SERIES ON DEMOCRACY AND TERRORISM 20 (2005), available at <http://www.safe-democracy.org/docs/CdM-Series-on-Terrorism-Vol-1.pdf> (last visited Sept. 30, 2005).

63. Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT'L L. 373 (1996).

their own certain threats and addressing them, while ignoring those of others. Treating terrorism as a zero-sum-game leads to a lose-lose scenario for all except the terrorists. The summary of recommendations for addressing the threat due to terrorism is quite comprehensive and helpful.⁶⁴

IV. REPORT OF THE UN SECRETARY GENERAL, "IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL"

In March 2005, U.N. Secretary General Kofi Annan, submitted a report to the U.N. General Assembly entitled: "In Larger Freedom: Towards Development, Security and Human Rights for All."⁶⁵ The core philosophy behind this report is clearly reflected in the words of the Secretary General in a statement to the General Assembly in which he observed, "What I am proposing amounts to a comprehensive strategy. It gives equal weight and attention to the three great purposes of this Organization: development, security and human rights, all of which must be underpinned by the rule-of-law."⁶⁶

The geo-political context in which the report was presented provides scope for bringing together the heads of state and government to see each other's viewpoint on important issues affecting the international community. The Executive Summary of the report notes:

The world must advance the causes of security, development and human rights together, otherwise none will succeed. Humanity will not enjoy security without development, it will not enjoy development without security, and it will not enjoy either without respect for human rights. . . . Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global collaboration among states.⁶⁷

64. On the problem of terrorism, the summary of recommendations of the high-level panel report observed that the United Nations, with the Secretary-General taking a leading role, should promote a comprehensive strategy against terrorism, including: (a) Dissuasion, working to reverse the causes or facilitators of terrorism, including through promoting social and political rights, the rule-of-law and democratic reform; working to end occupations and address major political grievances; combating organized crime; reducing poverty and unemployment; and stopping State collapse; (b) Efforts to counter extremism and intolerance, including through education and fostering public debate; (c) Development of better instruments for global counter-terrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights, including in the areas of law enforcement; intelligence -sharing, where possible; denial and interdiction, when required; and financial controls; (d) Building State capacity to prevent terrorist recruitment and operations; (e) Control of dangerous materials and public health defense. *In Larger Freedom*, *supra* note 4, at 82-83, ¶¶ 38(a)-(e).

65. *Id.*

66. U.N. Secretary-General, Statement to the General Assembly (Mar. 21, 2005), <http://www.un.org/largerfreedom/sg-statement.html> (last visited Sept. 30, 2005).

67. *In Larger Freedom*, *supra* note 4.

It is important to note that the report of the Secretary General developed the concepts of 'collective security' and 'cluster of threats' as observed in the High-level Panel's report.⁶⁸ However, this report goes further. It provides a philosophical and practical coherence to the notion of collective security by drawing from the U.N. Charter's words, "larger freedom." While human rights and development⁶⁹ have been discussed before, the inclusion of security into the focus of the attention of the international community is desirable, but is not without debate.⁷⁰ The notion of "larger freedom" has itself been contested in the past and traces of such contest can be seen in the debates that prevailed during the passing of the International Covenant on Civil and Political Rights (ICCPR)⁷¹ and the International Covenant on Economic and Social Rights (ICESCR).⁷² We have come a long way since the time when grave doubts were expressed about whether there can be anything like economic and social rights. The integral understanding of civil and political rights (CPR) and economic and social rights (ESR)⁷³ is, in my view, recognizing the notion of "larger freedom." Another facet of "larger freedom" is the recognition of different types of threats to humanity and the need for preventing those threats, with a view to ensuring the three freedoms: freedom from want, freedom from fear, and freedom to live in dignity. The report has provided an elaborate discussion on each of these freedoms and how national strategies and global action need to be tuned to ensure that each of those freedoms is fully protected.⁷⁴

In the section on freedom from fear, the report underlines the need for a "shared assessment" of threats and a "common understanding" of the

68. See Jennifer Moore, *Collective Security with a Human Face: An International Legal Framework for Coordinated Action to Alleviate Violence and Poverty*, 33 DENV. J. INT'L L. & POL'Y 43 (2004).

69. See Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734 (2000).

70. PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT 122–66 (2004); Peter Uvin, *On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise*, 17 PRAXIS 1 (2002), available at fletcher.tufts.edu/praxis/xvii/Uvin.pdf; Hugo Slim, *A Response to Peter Uvin: Making Moral Low Ground: Rights as the Struggle for Justice and the Abolition of Development*, 17 PRAXIS 1 (2002), available at fletcher.tufts.edu/praxis/xvii/Slim.pdf (last visited Nov. 16, 2005).

71. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. DOC. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

72. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. DOC. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

73. *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, ¶ 10, delivered to the Economic and Social Council, U.N. DOC. E/2002/68 (May 20, 2002).

74. See Shashi Tharoor, *Are Human Rights Universal?*, PROJECT SYNDICATE (June 2002), available at www.project-syndicate.org/commentaries/commentary_text.php4?id=890&lang=1&m=series (last visited Sept. 30, 2005).

obligations of the states.⁷⁵ Like the High-level panel report, the U.N. Secretary General's report takes a broader approach to threats and observes:

The threats to peace and security in the 21st century include not just international war and conflict, but terrorism, weapons of mass destruction, organized crime and civil violence. They also include poverty, deadly infectious disease and environmental degradation, since these can have equally catastrophic consequences. All of these threats can cause death or lessen life chances on a large scale. All of them can undermine States as the basic unit of the international system.⁷⁶

This argument is very important. Through it, the U.N. Secretary General is trying to speak to countries which perceive their own understandings of threat perceptions to be most important and urgent. However, the difficulty lies in making states hear, understand, and appreciate this. The fact is that non-recognition of different threats can potentially result in the undermining of States as the fundamental unit of the international system. But this does not give any space, whatsoever, to the international civil society and the global society movements that have, in recent times, seriously contested the state-centric international system. Further, it is conceivable that this argument will not be accepted by powerful states, who in their unilateralist approach to international governance will continue to function with their own national interests in mind. There is no doubt that the notion of collective security is the only way by which we can begin to solve the problem of terrorism at a global level. The fact that Annan emphasizes the upholding of larger freedom through development, security, and enforcing human rights for all ought to be well received.⁷⁷ But moving beyond the powerful rhetoric of this argument, contemporary state practice of powerful states like the U.S.A. and U.K. demonstrate little support to this notion, besides giving lip service. The report has observed that:

The strategy against terrorism must be comprehensive and should be based on five pillars: it must aim at dissuading people from resorting to terrorism or supporting it; it must deny terrorists access to funds and materials; it must deter States from sponsoring terrorism; it must

75. *In Larger Freedom*, *supra* note 4, at 24, ¶ 75.

76. *Id.* at 24–5, ¶ 78.

77. See generally Mac Darrow and Amparo Tomas, *Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation*, 27 HUM. RTS. Q. 471 (2005).

develop State capacity to defeat terrorism; and it must defend human rights.⁷⁸

There can be few disagreements on these five pillars, but the key issue still remains as to how the powerful states are going to prioritize the attention that needs to be given among the five pillars. For example, it is a well known fact that the U.N. Secretary General's fifth pillar, "it must defend human rights",⁷⁹ has taken a significant beating due to the war on terror. There are numerous instances of the war on terror compromising human rights and civil liberties.⁸⁰

V. RESPONSES TO TERRORISM WITHIN THE RULE-OF-LAW FRAMEWORK

The response to terrorism ought to be based on a holistic and inter-related understanding of human security, human rights, and human development—and all within the human rights and the rule-of-law framework.⁸¹ This is a significant challenge and herein lays the core of the problem.⁸² The contemporary nature of threats in the form of catastrophic terrorism caused by suicide bombers or others who are systematically engaged in committing similar acts are indeed acts of terrorism.⁸³ The domestic and international legal framework that is being put in place in the form of responses to terrorism is desirable.⁸⁴ But what is not acceptable is when individual states resort to unilateral actions that are not justified within the international law framework, or commit acts that violate the Geneva Conventions or the Convention Against Torture.⁸⁵ Further, the counter-terrorist legal framework should not violate

78. *In Larger Freedom*, *supra* note 4, at 26, ¶ 88.

79. *Id.*

80. See generally, Kenneth Roth, *The Fight against Terrorism: The Bush Administration's Dangerous Neglect of Human Rights*, in *WARS ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM AND U.S. FOREIGN POLICY* 247, 113–131 (Thomas G. Weiss et al. eds., 2004).

81. For further reading, see Jack Donnelly, *International Human Rights: Unintended Consequences of the War on Terrorism*, in *WARS ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM AND U.S. FOREIGN POLICY* 247, 98–112 (Thomas G. Weiss et al. eds., 2004).

82. See generally Paul Hoffman, *Human Rights and Terrorism*, 26 *HUM. RTS. Q.* 932 (2004).

83. For an international relations perspective on terrorism, see Shashi Tharoor, *September 11, 2002: Understanding and Defeating Terrorism One Year Later*, 27 *FLETCHER F. WORLD AFF.* 9 (2003).

84. For a critical perspective on responses to terrorism, see Martha Crenshaw, *Unintended Consequences: How Democracies Respond to Terrorism*, 21 *FLETCHER F. WORLD AFF.* 153 (1997). See also *Note, Responding to Terrorism: Crime, Punishment and War*, 115 *HARV. L. REV.* 1217 (2002) (discussing past acts of terror and the United States' response to them).

85. For an extensive discussion of the question as to what constitutes terrorism, see Gross, *supra* note 7. See also *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984). The Convention covers all "persons" and is not limited to categories of detainees such as prisoners of war. *Id.*

international human rights norms and the domestic constitutional and human rights guarantees.⁸⁶ There is a specific challenge that is being posed to international human rights law.⁸⁷ Besides the fact that these actions undermine the moral legitimacy of states, they also undermine the institutional legitimacy of the United Nations. The rule-of-law framework,⁸⁸ both domestically and internationally, cannot have different types of rules and principles depending upon the powerful nature of the country involved. Individuals and states ought to abide by the rule-of-law framework.⁸⁹ Further, use of force should not be the sole response as it is given to believe in the war on terror. Individual states, while passing counter terrorist legislation, ought to take into consideration the human rights implications and its potential for abuse by law enforcement authorities.⁹⁰ Writing about the reference to war on terror, Mrs. Mary Robinson, Former U.N. High Commissioner for Human Rights observed:

That the language of being "at war with terrorism" was used from the beginning has direct, and nefarious, implications. It brought a subtle—or not so subtle—change of emphasis in many parts of the world: order and security became priorities that trumped all other concerns. As was often the case in the past during times of war, the emphasis on national order and security frequently involved curtailment of democracy and human rights. . . . Questions arise as to when, if ever, this war on terrorism will be won. Are we, as the novelist and commentator Gore Vidal⁹¹ has characterized it, embarked on a Perpetual War for Perpetual Peace?⁹²

86. See *Terrorism and Human Rights: Preliminary Report Prepared by Ms. Kalliopi K. Koufa*, U.N. DOC. E/CN.4/Sub.2/1999/27 (June 7, 1999), available at www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2_99_27.pdf (last visited Sept. 30, 2005); see also *Terrorism and Human Rights: Progress Report Prepared by Ms. Kalliopi K. Koufa*, U.N. DOC. E/CN.4/Sub.2/2001/31 (June 27, 2001), available at www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2_01_31.pdf (last visited Sept. 30, 2005).

87. See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 120–21 (2002); and for a response, Hillary Charlesworth, *Author, Author!: A Response to David Kennedy*, 15 HARV. HUM. RTS. J. 127 (2002).

88. Richard H. Fallon, Jr., *"The Rule-of-Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

89. See generally Rights at Risk, *supra* note 14.

90. For understanding this discussion in the context of India, see C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism while Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195 (2005).

91. GORE VIDAL, *PERPETUAL WAR FOR PERPETUAL PEACE* (2002). This was referred to in Mary Robinson, *Foreword*, in *WAR ON TERRORISM AND IRAQ: HUMAN RIGHTS, UNILATERALISM AND U.S. FOREIGN POLICY* 247, xvii (Thomas G. Weiss et al. eds., 2004).

92. Mary Robinson, *supra* note 91.

The fact that young people in different parts of the world are ready and willing to die for a cause (however legitimate or illegitimate it may be) seems there is something fundamental that has gone wrong. It is not acceptable to justify these actions because of certain policies that have impacted certain people or populace belonging to particular religions. But the fact of the matter is that killing innocent civilians cannot be justified for any cause, including as a response to the killing of innocent civilians. Further, suicide bombing poses a specific type of danger that is not being properly responded to.⁹³ Under these circumstances, there is a more urgent need for the international community to help in building societies which are based on principles of democracy, good governance, and human rights and development so that they do not serve as recruiting grounds for terrorists.

Further, the war on terror should be limited by principles of the rule-of-law and human rights.⁹⁴ Unfortunately, there have been numerous instances (ongoing) that have not given any encouraging signals that even otherwise, responsible countries have resorted to such measures that have violated principles of international law, international human rights law, and international humanitarian law. In all these matters, enforcement remains a key problem.⁹⁵ The U.N. Secretary General has quite rightly brought to the attention of the international community to this issue in his report, when he observed that:

Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so, we facilitate achievement of one of the terrorist's objectives. By ceding the moral high ground, we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.⁹⁶

In other words, hawkish responses feed into the loop of violence and are exactly the kind of appetizers hoped for by terrorists. He has clearly underlined the need for counter-terrorist measures to be in conformity to human rights, and recommended to the Commission on Human Rights the appointment of a special rapporteur to specifically deal with this issue.

93. Scott Atran, *Mishandling Suicide Terrorism*, 27 WASH. Q. 67 (2004).

94. HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES 10-11 (2003), available at www.hrw.org/un/chr59/counter-terrorism-bck.pdf (last visited Nov. 16, 2005).

95. See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

96. *In Larger Freedom*, *supra* note 4, at 27, ¶ 94.

The Lawyers Committee for Human Rights, a U.S.-based NGO in its September 2003 report entitled, "Assessing the New Normal: Liberty and Security for the Post-September 11 United States" quite rightly asserted:

The United States' detachment from its own rule-of-law principles is having a profound effect on human rights around the world. Counter-terrorism has become the new rubric order under which opportunistic governments seek to justify their actions, however offensive to human rights. Indeed, governments long criticized for human rights abuses have publicly applauded U.S. policies, which they now see as an endorsement of their own longstanding practices.⁹⁷

What we are witnessing is all-round degradation of the rights environment, led at the forefront by the most powerful state.

The rule-of-law that is being discussed is two-dimensional. First, it is the domestic rule-of-law which the counter-terrorist measures ought to conform to. This means that the legislation being passed to counter terrorism and other policies that are being implemented worldwide (e.g., the shoot-to-kill policy in the U.K.) ought to conform to domestic legal, constitutional, and other human rights legislation. They should also conform to the judicial decisions that have interpreted the law, providing the scope of its enforcement. Further, whether the particular counter-terrorist measures are in conformity to the legislation ought to be determined by an independent judicial tribunal. The countries should also establish human rights commissions⁹⁸ and/or other commissions such as the Independent Commission for Police Complaints, which can receive complaints against the law enforcement authorities. It is important that counter-terrorist measures do not discourage civil society activism and other forms of genuine criticism or other forms of legal and non-violent resistance to draconian laws and policies. These are part of the protection of the domestic rule-of-law framework.

The international rule-of-law framework is protected on the basis of countries adhering to the principles of international law, international human rights, and international humanitarian law. It is unfortunate that contemporary history has numerous examples when international rule-of-law has been undermined. There is a responsibility on the part of all nations, including the most powerful ones, to once again reiterate that respect for the rule-of-law should be the basis by which peace and security can be ensured. Otherwise,

97. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES V* (2003) [hereinafter *LAWYERS COMMITTEE*].

98. For a critical perspective on National Human Rights Commissions (NHRCS), see C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 *Am. U. Int'l L. Rev.* 259 (2003).

hypocrisy becomes institutionalized in the international system where words become meaningless if unsupported by actions.

The Lawyers Committee for Human Rights, in the same report that was previously discussed, gives the negative consequences of not respecting the rule-of-law and observed:

The U.S. government can no longer promise that individuals under its authority will be subject to a system bound by the rule-of-law. In a growing number of cases, legal safeguards are now observed only so far as they are consistent with the chosen ends of power. Yet, too many of the policies that have led to this new norm not only fail to enhance U.S. security . . . but also exact an unnecessarily high price in liberty. For a government unbound by the rule-of-law presides over a society that is something less than free.⁹⁹

In a similar vein, recently, in a statement entitled “On Terrorists and Torturers” issued by the UN Office of the High Commissioner for Human Rights to mark the Human Rights Day 2005, she observed: “The law provides the proper balancing between the legitimate security interests of the State with the individual's own legitimate interests in liberty and personal security. It must do so rationally and dispassionately even in the face of terror. For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually improves human security. Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and for its neighbors. Pursuing security objectives at all costs may create a world in which we are neither safe nor free. This will certainly be the case if the only choice is between the terrorists and the torturers”.¹⁰⁰

VI. ROLE OF INTERNATIONAL INSTITUTIONS IN ENSURING LARGER FREEDOM

‘Larger freedom’ can be ensured only if development, security, and human rights are assured for all. This means that the international institutions which are working to deal with different issues need to be empowered so that they are in a position to respond to different types of threats. The reform that is being suggested both in the High-level Panel’s report and the U.N. Secretary General’s report are indeed positive developments. The U.N. Office of the High Commissioner for Human Rights will have an important role to play. Already,

99. LAWYERS COMMITTEE, *supra* note 97.

100. Louise Arbour, Statement by U.N. High Commissioner for Human Rights, Dec. 7, 2005, <http://www.unhchr.ch/huricane/hurricane.nsf/view01/3B9B202D5A6DCDBCC12570D00034CF83?opendocument> (last visited Dec. 8, 2005).

this office¹⁰¹ has taken efforts in the past to bring in greater attention to the economic and social rights and also issues relating to extreme poverty¹⁰² and the right to development.¹⁰³

The UNDP has also played an important role in developing rights-based approaches to poverty reduction and other issues relating to development and governance.¹⁰⁴ Relating to development and security, both human rights are something that can have a significant impact on the work of the U.N. Office for the High Commissioner for Human Rights. While there are special rapporteurs for some of these issues, it is time that the commission takes this matter to the domestic human rights machinery. In particular, it will be very helpful to involve the national human rights institutions (NHRIs).

The international human rights framework and other international legal frameworks, when it comes enforcing international law in the states, need to rely on the domestic enforcement machinery. It is here that the national human rights institutions and/or similar commissions come to play an important role. The NHRIs can take initiatives at the domestic level in relating the notion of "larger freedom" to the domestic constitutional, human rights, and legislative measures that are in place. As discussed earlier, there are profound human rights implications of counter-terrorism measures and draconian laws that are being passed in different countries. If the concept of 'larger freedom' is being discussed at the domestic level, then it is possible to prevail upon the states that we need to move towards human security from our narrow and traditional understanding of state or national security. This is not to undermine the existing importance of the state, but rather to further strengthen the capacity of the state to respond to a variety of threats. In this regard, impact of such an approach will have good effect on both developing and developed countries.

In developing countries, which are also taking counter-terrorism measures, there will be a better understanding of the causes of terrorism and also more viable and sustainable responses to terrorism with a view to expanding freedoms by ensuring development and human rights. This will relate well with the efforts of the international community to achieve the MDGs within a timeframe and help in fulfilling the mandate of the Special Rapporteurs on the Right to Development and Extreme Poverty and Human rights, both of which are

101. Human Rights and Extreme Poverty, C.H.R. Res. 2004/23, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., ¶ 10(e), U.N. Doc. E/CN.4/RES/2004/23 (2004).

102. U.N. Office of the High Commissioner for Human Rights, *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies*, ¶ 13 (2002), available at www.unhchr.ch/development/povertyfinal.html (last visited Sept. 30, 2005).

103. G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186–87, U.N. Doc. A/41/53 (1987).

104. UNITED NATIONS DEVELOPMENT PROGRAMME, POVERTY REDUCTION AND HUMAN RIGHTS: A PRACTICE NOTE (2003), available at www.undp.org/poverty/practicenotes/povertyreduction-humanrights0603.pdf (last visited Sept. 30, 2005).

inextricably connected to the idea of 'larger freedom.' As far as developing countries are concerned, it will provide a firm basis for promoting multilateralism in the efforts to counter terrorism, and this effort should go along with the efforts to respond to other threats. The fact of the matter is that both developed and developing countries need to work together in creating a more secure world. Collective security means that there is need for partnership at all levels and most importantly, to realize that security, development and human rights—are all related to each other and indeed help in reinforcing each other. Unilateralism cannot work under the rubric of war on terror. There is no doubt that for the fight against terrorism to succeed, there is a need for seriously empowering the role of international institutions in a genuine manner. It is important for the U.S. to understand this; Shashi Tharoor, U.N. Under Secretary General for Communications and Public Information, in an article in *Foreign Affairs* observed:

The U.N., from the start, assumed the willingness of its members to accept restraints on their own short-term goals and policies by subordinating their actions to internationally agreed rules and procedures, in the broader long-term interests of world order. . . . The U.N. was meant to help create a world in which its member states would overcome their vulnerabilities by embedding themselves in international institutions, where the use of force would be subjected to the constraints of international law. Power politics would not disappear from the face of the earth but would be practiced with due regard for universally upheld rules and norms. Such a system also offered the United States—then, as now, the world's unchallenged superpower—the assurance that other countries would not feel the need to develop coalitions to balance its power. Instead, the U.N. provided a framework for them to work in partnership with the United States.¹⁰⁵

VII. ROLE OF NGOS¹⁰⁶ AND THE DOMESTIC AND INTERNATIONAL CIVIL SOCIETY MOVEMENTS

The non-governmental organizations have an important role to play in the fight against terrorism, particularly with regard to activism.¹⁰⁷ The role of civil society is important and should be seen in the light of judicial protection of

105. Shashi Tharoor, *Why America Still Needs the United Nations: The Power of Legitimacy*, 82 FOR. AFF. 5 (2003), available at <http://www.shashitharoor.com/articles/foreignaffairs.html> (last visited Sept. 30, 2005).

106. See Jurij Daniel Aston, *The United Nations Committee on Non-Governmental Organisations: Guarding the Entrance to a Politically Divided House*, 12 EUR. J. INT'L L. 943, 948 (2001).

107. Wendy Schoener, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537 (1997).

human rights as well as constitutionalism.¹⁰⁸ There are a variety of NGOs worldwide who are working in various issues relating to terrorism. These include not only international human rights NGOs, but also a number of grass-root organizations, religious groups, voluntary groups, aid organizations, and others. As discussed in previous sections, the challenge posed by terrorism is significant and that it is impossible for states and even the inter-governmental organizations to respond adequately. At the community level, the NGOs play a very important role, whether it is to educate the populace about the problem of terrorism or to prevent and dissuade people of different faiths to resort to violence of any kind. This violence may be used either to achieve a legitimate political goal or as hate crimes against people belonging to a particular religion, region or race.

There have been numerous reports of hate crimes or other sorts of attacks against people belonging to the Muslim religion in the aftermath of 9/11 attacks in the U.S., and there are already reports of similar instances in the U.K. after the London bomb attacks. While these were by and large sporadic instances, these raise serious concerns not only among the members of the particular religious community, but also others. In this regard, the NGOs can play a very important role, particularly in educating those people who are involved in interacting with diverse members of the society. NGOs also provide aid and relief during post-conflict situations. It is important that the international community recognize the role of NGOs and to empower them so that they can perform their functions better.¹⁰⁹

One of the strongest and most powerful ways by which the 'war on terror' was challenged, in particular the war against Iraq, was the development of vibrant international civil society¹¹⁰ movements worldwide protesting against the war.¹¹¹ Nelson Mandela has said in this context that the world has two superpowers, the United States and world public opinion. While these efforts were not successful, it provides a strong and clear message to the countries that were engaged in the war in the name of its own people, that there are a vast majority of its citizens who are not in agreement with the decision to go to war.

108. See C. Raj Kumar, *Moving Beyond Constitutionalization and Judicial Protection of Human Rights: Building on the Hong Kong Experience and Civil Society Empowerment*, 26 LOY. L.A. INT'L & COMP. L. REV. 281 (2003).

109. For a critical perspective, see Kerstin Martens, *Examining the (Non-)Status of NGOs*, 10 IND. J. GLOBAL LEGAL STUD. 1 (2003).

110. See generally Gordon A. Christenson, *World Civil Society and the International Rule-of-Law*, 19 HUM. RTS. Q. 724 (1997).

111. Michael W. Foley & Bob Edwards, *The Paradox of Civil Society*, 7 J. DEM. 38, 38–52 (1996).

An empowered civil society is in a position to make the government of the day re-examine its policies and decision and in some circumstances change it.¹¹²

VIII. THE WAY FORWARD

The problem of terrorism has indeed received global attention. The responses it has generated are truly significant and have a profound impact on law, politics and society. At the same time, it is important for the international community to come to terms with the fact that whatever strategies that were evolved for fighting terrorism by pursuing the "war on terror" are just not working. All indications are that the violence has been continuing in the battleground of the war on terror e.g. Iraq and also Afghanistan. The fact of the matter is that it is important for the international community to embrace the U.N. Secretary General's report "in larger freedom" and to accept his recommendations in entirety. However, accepting his recommendation is one thing; moving towards a paradigm shift in pursuing the "war on terror" is another thing.

A number of issues need to be considered. It is important that the international community distinguishes two aspects of terrorism-related violence. The first aspect relates to terrorism in the form of individuals and/organizations involved in criminal acts, organized crime, money laundering, including corruption and using these resources, including connections, for engaging in terrorist activities. The issue of corruption is also a very important dimension to counter-terrorism efforts, insofar as it is related to organized crime, money laundering and other crimes.¹¹³ Corruption affects state capacity to deal with various threats including terrorism. It definitely can compromise state security and it is important to examine corruption from the standpoint of its implications for human rights¹¹⁴ and the rule-of-law.¹¹⁵ This aspect is clearly criminal and the approach ought to be to use the domestic and international law enforcement machinery to ensure that the people who are engaged in these activities are punished.

112. See generally Dana R. Fisher & Jessica F. Green, *Understanding Disenfranchisement: Civil Society and Developing Countries' Influence and Participation in Global Governance for Sustainable Development*, 4 GLOBAL ENV'T'L POL. 65, 65-84 (2004).

113. See generally C. Raj Kumar, *Corruption and Human Rights - Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31 (2003).

114. See C. Raj Kumar, *Corruption in Japan: Institutionalizing the Right to Information, Transparency and the Right to Corruption-Free Governance*, 10 NEW ENG. J. INT'L & COMP. L. 1 (2004).

115. See generally C. Raj Kumar, *Human Rights Approaches of Corruption Control Mechanisms—Enhancing the Hong Kong Experience of Corruption Prevention Strategies*, 5 SAN DIEGO INT'L L.J. 323 (2004).

There is another aspect to the problem of terrorism- a need for greater caution, creativity and political judgment. This concerns the growth of religious fundamentalism and extremism that is being advocated to achieve certain causes. Here, the battle takes place in the minds of youths in many parts of the world and it is clearly an ideological issue, which is given a huge dose of religious extremism. The result is there is a proliferation of thinking, and even discourse, advocating certain acts and/or glorifying, and at times tolerating, acts that are patently unacceptable to humane conduct. The traditional law enforcement approach of dealing with crimes, including crimes relating to terrorism, will not be entirely successful. There is a need for greater engagement within the community and in particular to involve the right thinking members of the particular religious community. The change has to come from within and an environment ought to be created in which violent acts of any kind are not tolerated. But for this change to come within, the international community and in particular the powerful countries have to take responsibility for their actions.

Respect for international law, international human rights law and international humanitarian law should be emphasized so that multilateralism remains the approach to fight global terrorism. International institutions need to be empowered. The fight against terrorism should take place at different levels. While the international community takes efforts to ensure greater security, it is also important to understand security much beyond national security. Along with this, efforts need to be taken to address development issues, including third world aid and debt. The partnership between developing and developed countries should be based upon a sense of common humanity where threats of all kinds are jointly addressed. Thus, national security strategies should bear in mind that human security threats are much wider and that countries formulating these strategies should bear in mind the notion of 'larger freedom.' This will ensure that security and development are achieved within the human rights framework.

Domestically, it is important to recognize that the fight against terror should not take any undue priority to the neglect of other equally important issues relating to development and governance.¹¹⁶ The counter-terrorist laws and practices that are being developed should be based upon greater respect for human rights and that should be within the rule-of-law framework. Further, there is a need for strengthening the working of national human rights institutions, courts and other related departments so that the goal is to achieve larger freedom and in the process, ensure security, development and human rights. The domestic constitutional commitment and laws and regulations ought

116. See generally Saladin Al-Jurf, *Good Governance and Transparency: Their Impact on Development*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 193 (1999).

to be protected in the fight against terrorism so that civil liberties are not undermined.

It is important that the international community recognizes global terrorism as a problem that needs to be tackled by the people themselves, as much by the states. After all, it is civilians who suffer the most from this phenomenon, not faceless bureaucrats or uniformed soldiers. Just as there has been a fair amount of success in seeking partners in development in the form of collaboration with people in developing countries by organizations like the UNDP, even in the fight against terror, there is a need for partnership. This partnership can be with both domestic and international NGOs as well as civil society movements. Worldwide, there are a significant number of people who are ready to join hands with governments to legitimately fight against terrorism. But for this fight to be morally coherent and universally acceptable, it should be based upon principles and not make citizens accomplices in militarist build-ups. The international community ought to speak in one voice along with the international institutions so that terrorism of any kind is not condoned in one part of the world, while condemned in another.

Larger freedom is about ensuring people a variety of choices in their life. These choices are possible only if their security, development and human rights are assured. Values of love, non-violence and fraternity, are essential to the progress of societies and for the common good of the humanity. The present state of anti-terrorism efforts have given little assurance to people who are perpetually in fear of insecurity, who are living without any hope for development and whose human rights are violated day in and day out.

VICTIMS OF PEACE: CURRENT ABUSE ALLEGATIONS AGAINST U.N. PEACEKEEPERS AND THE ROLE OF LAW IN PREVENTING THEM IN THE FUTURE

*Alexandra R. Harrington**

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I. INTRODUCTION

Peacekeepers, and peacekeeping, have had a special place in society since the time of the Bible,¹ and indeed have taken on a new, international dimension since the end of World War II and the creation of the United Nations (U.N.).² Unfortunately, since the creation of the United Nations peacekeepers (U.N. peacekeepers) as a reality of international conflict intervention,³ a disparity in

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1. Matthew 5:9 ("Blessed are the peacemakers: for they shall be called the children of God.").

2. See MICHAEL P. SCHARF, *THE LAW OF INTERNATIONAL ORGANIZATIONS* 1-10 (2001) (describing the Allies' efforts to create and implement a functional international organization, known as the United Nations (U.N.), in the wake of their victory in World War II).

3. *Id.* at 477-524 (outlining the administrative and legal governance of U.N. peacekeepers). See

how one defines peacekeepers has been created. For laymen, Webster's Dictionary defines "peacekeeping" as "the preserving of peace."⁴ For lawyers, Black's Law Dictionary does not define the term outright, but defines the concept of "peace" at law as "[a] state of public tranquility; freedom from civil disturbance or hostility."⁵ However, for an increasingly visible number of people living in the areas to which U.N. peacekeepers have been deployed, peacekeepers are defined in other terms: rapists,⁶ patrons of prostitutes,⁷ child pornographers,⁸ molesters,⁹ absentee fathers,¹⁰ tormentors,¹¹ spreaders of contagion and disease,¹² to name some of the most egregious. Indeed, the U.N. itself defines the multi-national contingent which it deploys as peacekeepers¹³ to trouble spots across the globe not only as humanitarians, but also as "boys,"¹⁴ using the idea of "[b]oys will be boys"¹⁵ to justify supplying the peacekeepers with pouches of condoms along with their uniforms and official status.¹⁶

also GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* 1-3 (2004) (describing the recent expansion of the peacekeeping function of the U.N. in terms of troops and monetary expenditures).

4. MERRIAM-WEBSTER ONLINE, www.m-w.com/peacekeeping (last visited Apr. 22, 2005).

5. BLACK'S LAW DICTIONARY 1166 8th ed. (2004).

6. See, e.g., Nick Wadhams, *U.N. Probes Sex Abuse Allegations in Congo*, AP ONLINE REGIONAL - AFRICA, Nov. 11, 2004, available at <http://www.ap.org/> (last visited Sept. 30, 2005).

7. See, e.g., *Id.*; Leyla Linton, *Report: U.N. Troops Exploited Congo Girls*, AP ONLINE REGIONAL - AFRICA, Jan. 8, 2005, available at <http://www.ap.org/> (last visited Sept. 30, 2005).

8. See Mark Turner, *Call to act over sexual abuse by UN peacekeepers*, FINANCIAL TIMES (LONDON), Nov. 18, 2004, at 7.

9. *Id.*

10. See, e.g., Thalif Deen, *Politics: U.N. Battles Sexual Abusers in Congo Peacekeeping*, INTER PRESS SERVICE NEWS AGENCY (IPS), Mar. 25, 2005, available at <http://ipsnews.net/index.asp> (last visited Sept. 30, 2005).

11. See Edith M. Lederer, *U.N. Seeks Police for Congo Peacekeeping*, AP ONLINE REGIONAL - AFRICA (Feb. 2, 2005) (describing the "sexual exploitation" alleged to have occurred at the hands of the U.N. peacekeepers in the Congo), available at <http://www.ap.org/> (last visited Sept. 30, 2005).

12. Brit Hume, *Bush Tells Syria To Leave Lebanon*, FOX SPECIAL REPORT, Mar. 2, 2005 (Fox News ran a four-part series on the U.N. peacekeeper abuse allegations.) (hereinafter FOX SPECIAL REPORT).

13. See UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, PEACE AND SECURITY SECTION, *THE SURGE IN U.N. PEACEKEEPING: UNITED NATIONS PEACEKEEPING* (2005) (detailing the rise in U.N. peacekeeping activities and the member states which participate in the multi-national peacekeeping forces), <http://www.un.org/Depts/dpko/dpko/pub/exhibition> (last visited Sept. 30, 2005).

14. Colum Lynch, *U.N. Faces More Accusations of Sexual Misconduct; Officials Acknowledge 'Swamp' of Problems and Pledge Fixes Amid New Allegations in Africa, Haiti*, WASH. POST, Mar. 13, 2005, at A22 (describing a U.N. official in Cambodia's response to sexual abuse allegations in Cambodia in 1990 as "[b]oys will be boys").

15. *Id.*

16. Tobias Kuhlmann, *Educating Peacekeepers about AIDS*, U.N. CHRONICLE - ONLINE EDITION, Mar. 1, 2004 (explaining the condom distribution under the logic of "[w]ith many of them [peacekeepers]

On a basic humanitarian level, the above should shock readers of any nationality and profession. To lawyers, however, especially those concerned with international law, the above should serve as a wake-up call for the need to change the legal parameters of multi-national peacekeeping. American lawyers should be particularly concerned with U.N. peacekeeper abuses because of the role of the United States in creating the U.N.,¹⁷ and the close ties between the largely United States (U.S.) written U.N. Charter¹⁸ and the current, inferential concept of the acceptability of peacekeeping which has grown out of it.

The goal of this paper is not merely to critique the U.N. and its handling of the current peacekeeper abuse allegations, as such a critique would only serve half of the problem. Rather, this paper will use the past and current understandings of the U.N. Charter, peacekeeping, international law, and military justice to suggest several options for handling both the current allegations facing U.N. peacekeepers, especially those in the Congo, and for a fundamental change in the peacekeeping mission, apparatus, and law in the future.

Part II of this paper will examine the origins of the concept of peacekeeping. It will go beyond the current and past concepts of U.N. peacekeeping to explore the plain language of Chapter VII of the U.N. Charter, and the way in which it was originally interpreted—namely to substantiate a standing U.N. military force and centralized command with no mention of peacekeeping activities *per se*.

Part III will discuss the current allegations against U.N. peacekeepers in the Congo and elsewhere, as well as the vague allusions to decades of peacekeeper abuse found in sources from across the world and the political spectrum. Also included in this Part is the U.N. reaction to the allegations and the above mentioned condom distribution system in effect for U.N. peacekeepers. Finally, this Part will discuss the spread of Human Immunodeficiency Virus (HIV) through U.N. peacekeepers and the lax testing requirements in place for peacekeepers both before and during their active duty.

Part IV will discuss the current laws in effect regarding peacekeepers. Perhaps the simplest part of the inquiry, this discussion will illustrate that U.N. peacekeepers are essentially shrouded in protection from their home countries. The iniquity of this system will be examined, looking at the inequality of military justice available against peacekeepers based on their country of origin.

young and sexually active, often deployed to or from regions with high HIV/AIDS prevalence, and by profession inclined to risky behavior, some consider the peacekeepers to be 'more likely to contract or transmit the virus than the average population'), *available at* <http://www.un.org/Pubs/chronicle/2004/issue1/0104p55.asp> (last visited Sept. 30. 2005).

17. See SCHARF, *supra* note 2, at 1–10.

18. *Id.*

Part IV will then examine the current International Criminal Court (ICC) statute and discuss why the extension of the ICC crimes and procedures to peacekeepers would not be an effective way to ensure either prosecution of peacekeepers for individual abuses or eligibility for prosecution at all. To set the framework for the discussion in Part VI, this Part will also include a basic outline of the sanction power possessed by the United Nations Security Council (UNSC).

In contrast to the legal morass presented in Part IV, Part V will describe the current status of the United States Code of Military Justice (USCMJ) and what prosecutions of peacekeepers would be allowed under it. A comparison of the procedural aspects of a prosecution under the USCMJ and the ICC statute provisions will be made as well.

The culmination of this paper is Part VI, in which the author presents several possible options for addressing the current U.N. peacekeeper abuse allegations and for changing peacekeeping in the future. It is the author's belief that, in light of past attitudes of U.N. officials towards peacekeeper abuse allegations and the current spate of corruption allegations plaguing the U.N. and its administration, the U.N. is an inappropriate organization to handle the peacekeeper abuses. To deal with the immediate allegations, the author recommends that the UNSC direct (and send trusted representatives to oversee) the creation of secure peacekeeper compounds, as well as promulgate rules creating new positions of overseers of peacekeepers who are representatives from at least two of the five permanent UNSC members based on their relative contribution. The author's reasoning for this suggestion, outside of the basic sense of responsibility for the U.N. forces which is imparted to the permanent members of the UNSC under the U.N. Charter, is her very strong belief that U.S. taxpayers, who are protected by concrete laws regarding such crimes as rape and molestation, would not want their money to go towards the further subsidization of peacekeepers who can prey on victims without a guaranteed recourse. In addition, the author highly advocates the use of economic sanctions against any countries which have contributed peacekeepers implicated in the abuse and have failed to prosecute, or failed to vigorously prosecute, those implicated peacekeepers. These sanctions should be followed up by removal of the home countries' currently stationed peacekeepers, and blacklisting of these countries from future peacekeeping missions, if vigorous criminal prosecution of the errant peacekeepers is not made by the home countries.

To address the future of peacekeeping, the author then proposes a reading of the Chapter VI provisions of the Charter closer to the original interpretation that these provisions evince the intent to create a military apparatus attached to the UNSC and under its ultimate control and authority. This reading would allow for the creation of a separate, standing military and peacekeeping force which would be under the joint command of at least two of the five permanent

UNSC members. While this in and of itself is not a new idea, the author then proposes that the recruitment and staffing of this force would not come from voluntary participation by U.N. member countries, but rather from international recruitment similar to that used by the American military. In this way, the peacekeepers would be under the control and law of the force itself and not their home countries. Given the many problems with the ICC statute as applied to at least the current peacekeeper abuses, the author would further propose that the most compatible military laws of the five permanent members (in all likelihood the U.S. and the United Kingdom (U.K.)) be used and applied to the peacekeepers in this force.

The conclusion of this paper, Part VII, restates the problems and suggestions discussed and offered throughout the paper. It also expresses the author's belief that peacekeeping as a concept offers many benefits, but that these benefits are outweighed by any types of abuses. The problem of the U.N. peacekeepers illustrates that international law is flawed in its attempts to create legal consensus throughout the world, with the ultimate result being that peacekeepers who prey on those they are assigned to protect are not subject to the same justice. In this situation, it is imperative that the countries which founded the U.N., particularly the U.S., provide structure to the peacekeepers. Lawyers facing conflicts of law issues will ultimately always have to choose one law over the other; if this works for commercial transactions then it should certainly work for the protection of people.

II. CHAPTER VI AND PEACEKEEPING HISTORY

The primary mandate of the U.N. is set out in Chapters V and VII of the Charter.¹⁹ These provisions make it the stated aim of the UNSC to "maintain] international peace and security,"²⁰ and to take action when there are perceived threats to international peace and/or security.²¹ A great deal of scholarly work has focused on when a threat would rise to the level of endangering either international peace and/or security, but, in recent years at least, there has not been as much focus on the military provisions of the Charter set out in Chapter VII.²²

19. U.N. CHARTER chs. V, VII.

20. *Id.* art. 24.

21. *Id.* ch. VII.

22. *Id.*; The author posits that this dearth of literature is due to the documented trend of interpreting the Chapter VII provisions as solely authorizing peacekeeping activities through inferential and, it has been argued, practical readings of the Charter. See generally ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (STUDIES IN INTERNATIONAL LAW) (2004). Concededly, part of the reason for the inability to enforce the literal Chapter VII provisions stemmed from the Cold War. *Id.* However, it is interesting to note that in the wake of the collapse of the Soviet Union and the end of the Cold

These provisions are the backbone of the inference that there should be a U.N. peacekeeping force established and maintained by the UNSC, however this is only an inference.²³ A literal reading of the plain language of the Charter leads one to believe that the goal of the framers of the U.N. Charter (which is to say the framers of the U.N. itself) was to create a standing military body,²⁴ under joint command,²⁵ to serve at the ready if necessary to protect that stated mission of the U.N.²⁶ On the heels of World War II, the victorious powers had seen their share of war and destruction,²⁷ and certainly peacekeeping and stabilization in the wake of war as well, yet the only literal provisions in the Charter are for the standing military idea.²⁸ Unfortunately, there are no interpretative aids for divining the intent of the drafters of the U.N. Charter with regard to these provisions, however it is not a stretch of the imagination to suggest that the intent was to create a standing military which would provide a

War there was no push to re-evaluate the understanding and application of Chapter VII, rather, there has been a push towards more peacekeeping activity and missions in the years since the end of the Cold War. *Id.*; see also UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, TIMELINE OF UNITED NATIONS PEACEKEEPING 1948–2005 (documenting a dramatic increase in the number of peacekeeping operations undertaken by the U.N. from the mid-1980s/early 1990s onward), <http://www.un.org/Depts/dpko/dpko/timeline/pages/timeline.html> (last visited Apr. 22, 2005); *Peacekeeping Resurgence*, U.N. CHRONICLE, Mar. 22, 2000.

23. See DE WET, *supra* note 22 (charting the growth and development of the peacekeeping concept out of inferences in the Chapter VII provisions); UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, Q&A —MEETING NEW CHALLENGES, WHAT IS PEACEKEEPING (stating that the basis for the power to establish and implement peacekeeping operations through the U.N. is because “[t]he Charter of the United Nations gives the UN Security Council the power and responsibility to take collective action to maintain international peace and security”), <http://www.un.org/Depts/dpko/dpko/faq/q1.htm> (last visited Apr. 22, 2005); *Fifty Unforeseen Years*, U.N. CHRONICLE – ONLINE EDITION, Sept. 22, 1998 (admitting that the U.N. Charter does not explicitly call for peacekeeping operations and positing that “[t]he Security Council presumably paused for detailed deliberation when, in 1948, it established the first peacekeeping mission, which built on the intent, if not the letter, of its assigned responsibility”), available at <http://www.un.org/Pubs/chronicle/1998/issue3/398p39.htm> (last visited Sept. 30, 2005).

24. U.N. CHARTER art. 47 (“There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.”). This works in conjunction with the article 43 provisions requiring that the members of the UNSC provide military forces and other resources to the UNSC for the international peace and security mission. *Id.* art. 43.

25. *Id.* art. 47 (“The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives.”).

26. *Id.* (“The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council.”).

27. See generally JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL (1994) (providing details of the horrors inflicted on the world by the Nazis who were tried at the Nuremberg tribunal).

28. U.N. CHARTER ch. VII.

host of services to the U.N. and the world population as a whole,²⁹ as a standard national military would do. Using this interpretation, peacekeeping would not need to be elaborated or inferred because it is part of standard military procedure;³⁰ the corollary to this is that there is no elaboration of a separate peacekeeping force, implying that all services were to be under the auspices of a joint command that was to be associated with the UNSC.³¹

Regardless of how one interprets the actual language of the U.N. Charter provisions, once the Cold War started it was accepted that the concept of a standing military force under a joint command would not be feasible.³² In this climate, the U.N. Charter provisions were re-examined, and found to infer the idea of a peacekeeping mandate which would grow to become the current U.N. peacekeeping force,³³ also known colloquially as the "blue helmets" due to the color of the uniforms used.³⁴

At present, there are 67,392 deployed peacekeepers from 103 countries stationed in various political and military hot spots throughout the world.³⁵ When conceptualizing the makeup of this peacekeeping force many, including the author, initially assume that there is some form of obligation on the part of U.N. members to provide troops and personnel to serve as peacekeepers. In truth, however, the provision of troops and personnel is entirely voluntary on the U.N. member countries,³⁶ which are compensated by the U.N. for these

29. *Id.* ch. V (providing the UNSC, and particularly the permanent members of the UNSC with the onerous task of the "maintenance of international peace and security"); *Id.* ch. I (listing, among the methods for maintaining international peace and security, "to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace").

30. For example, part of the current U.S. mission in Iraq is to keep the peace and rebuild the country, however there are no specified "peacekeepers" tasked to this purpose; rather, the military itself embraces these responsibilities as part of its standard protocol and mission.

31. At law, there are many methods for the interpretation of statutes, depending on the context and the question. Many of these are based on U.S. law and tradition, and therefore would be potentially problematic to use when attempting to interpret the U.N. Charter. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIAL ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 818 (3d ed. 2001). However, using a textual canon not based in these laws and traditions does not present the same conflict. Therefore, the author bases the analysis of the Chapter VII provisions on the interpretative canon of *expressio unis*, meaning that "the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." *Id.* at 824.

32. See DE WET, *supra* note 22.

33. *Id.*

34. See Wadhams, *supra* note 6.

35. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, ONGOING PEACEKEEPING MISSIONS SINCE 1948, <http://www.un.org/Depts/dpko/dpko/bnote.htm> (last visited Apr. 22, 2005).

36. See Linton, *supra* note 7.

troops and services.³⁷ A persistent problem for U.N. members which provide troops and services is recouping payment for these provisions.³⁸ The troops provided are military personnel within their home countries and, as will be discussed further in Part IV, are subject to the jurisdiction of their home countries for prosecution should the event occur.³⁹

Over the course of their history, U.N. peacekeepers have served in every conceivable situation, and indeed many have lost their lives in the course of peacekeeping activities.⁴⁰ In the spirit of these activities, the U.N. peacekeepers were awarded the Nobel Peace Prize in 1988,⁴¹ and are honored by the U.N. with a yearly ceremonial day of recognition and commendation.⁴² Perhaps this is the most disturbing contrast given the current abuse allegations, as various sources have reported that U.N. peacekeepers have been implicated in sexual abuse scandals and activities since their inception.⁴³ As with the composition of the peacekeeper missions themselves, these abuse allegations are a truly global phenomenon, with new and old allegations coming from Cambodia to the Congo to Haiti to name only a few.⁴⁴ Indeed, in 2004, only months before the

37. UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, Q & A – HOW ARE PEACEKEEPERS COMPENSATED?, <http://www.un.org/Depts/dpko/dpko/faq/q7.htm> (last visited Apr. 22, 2005).

38. *Id.* (explaining some instances in which compensation for volunteering peacekeepers has been withheld, and the financial hardships developing countries face when they provide volunteer peacekeepers to the U.N. and are compensated afterwards).

39. See Linton, *supra* note 7; Deen, *supra* note 10 (citing the U.N.'s own report—"[t]here is a . . . presumption that peacekeeping personnel who commit acts of sexual exploitation and abuse that constitute crimes under generally accepted standards (for example rape or sexual relations with young children) are not normally subjected to criminal prosecution, whether it be by court martial or by trial before a national criminal court, which would have been the inevitable result has they committed such acts in their home countries.").

40. Examples of peacekeeper deaths in action are spread throughout the course of missions over the last 50 plus years. For detailed statistics, see UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING—FATALITIES, <http://www.un.org/Depts/dpko/fatalities> (last visited Apr. 22, 2005). For recent incidents of peacekeeper deaths in action, see *DRC president condemns killing of UN peacekeepers*, XINHUA GENERAL NEWS SERVICE, Feb. 26, 2005 (stating that nine peacekeepers were killed in an ambush attack in the Congo).

41. 1988: *UN Peacekeeping Forces: 'The Imperial Soldiers'* (Nobel Prize), U.N. CHRONICLE, Sept. 1, 2003.

42. *UN Peacekeeping Missions: Best Way of Ensuring Sustainable Peace*, M2 PRESSWIRE, May 25, 2004.

43. See Linton, *supra* note 7 ("Charges of sex abuse and other crimes have been lodged against U.N. peacekeeping missions around the world for decades. Officials have found it difficult to crack down because the United Nations doesn't want to offend the relatively small number of countries that are willing to provide peacekeepers.").

44. Victoria Engstrand-Neascu, *News Feature: Predators in Congo sometimes wear uniforms*, DEUTSCHE-PRESS AGENTUR, Jan. 11, 2005; Joseph Loconte, *The U.N. Sex Scandal*, THE WEEKLY STANDARD, Jan. 3, 2005 (citing a history of allegations of peacekeeper abuse in Kosovo, Liberia, Guinea, and Sierra Leone as well as the Congo); Peter Moszynski, *NGOs in Sex for Food Scandal*, NEW AFRICAN, Apr. 1, 2002

first Congo abuse stories started to surface, there was a public admission by a U.N. official that there were sexual abuses by peacekeepers assigned to the border area of Ethiopia and Eritrea.⁴⁵

Thus, the history of the U.N. peacekeepers is one of questionable interpretation and activities as well as humanitarian awards and missions. What is most bothersome to this author is that the history of the peacekeepers has such a pronounced dichotomy between saving people and countries and acting as criminals. No matter how the U.N. Charter provisions are interpreted, the wording evinces the idea that some kind of security force was necessary to protect the world from the ravages of war and human atrocities, and indeed many peacekeepers have given their lives for this goal. However, those charged with carrying out the administrative charge created by the U.N. Charter have failed to protect both the intent of the U.N. Charter's framers and those who find themselves in the midst of war and chaos, and have allowed the peacekeepers to become victimizers.

III. ALLEGATIONS, CONTRACEPTIVES, AND HIV / AIDS

The primary abuse allegations addressed in this paper are the sexual abuse allegations made against the peacekeepers, as these represent the gravest breach of the duty of peacekeepers and represent an utter disregard for the sanctity of human life, particularly the lives of young girls. It is important to note, however, that in the days prior to the writing of this paper there have been increasing questions regarding the use of force by peacekeepers,⁴⁶ and whether force is used outside of the sanctioned self-defense realm.⁴⁷ This issue highlights the need for a central military law governing peacekeepers of all nationalities, as such a system would allow for a more immediate adjudication of such allegations and would ensure that those peacekeepers involved would be uniformly investigated, and either exonerated or prosecuted under the same legal principles and terms.

(identifying that, as early as 2002, reports regarding U.N. peacekeeper abuses of young children were surfacing to NGOs such as Save the Children in Sierra Leone, Guinea, and Liberia).

45. Cathy Majtenyi, *Radio Scripts—Correspondent Report 2-315770*, VOICE OF AMERICA NEWS, May 10, 2004 (explaining that the official admitted to some of these allegations in an effort to undermine public complaints from Eritrean officials regarding peacekeeper conduct).

46. *Hemisphere Briefing: Haiti: U.N. Peacekeepers Accused in Dispute*, SUN-SENTINEL (FT. LAUDERDALE, FL.), Mar. 6, 2005 (detailing Haitian government officials' allegations that peacekeepers stationed in Haiti inappropriately fired on an unarmed crowd of pro-Aristide protesters).

47. *See id.*

A Allegations Against The Peacekeepers

A young girl, out gathering coal for her family to use as they try to sustain themselves in the middle of a war, encounters a soldier on her errand.⁴⁸ In seconds she goes from coal bringer to rape victim at the hands of the soldier, who cavalierly walks away from his deed.⁴⁹ Worse yet, it is possible that this girl could face reprisals from her family if she tells them of the crime. Another young girl, roughly the same age as the first, prostitutes herself to a man in a uniform.⁵⁰ She is not a troubled teen, she is not a runaway, she is merely trying to get an egg so that her family might have something to eat for dinner.⁵¹

A young mother looks at her baby unsure of how to provide for it or how it will be accepted in her village. The father, a man in a uniform from another country and another race, has left and she cannot find him.⁵² Those who worked with him refuse to help her or her baby survive, let alone find the father.⁵³ Another mother, just seventeen years old, looks at her child and her husband in horror as she finds out that the soldier who attacked her gave her HIV/AIDS and she, unknowingly, has passed the disease on to her husband and newborn child.⁵⁴

These vignettes might sound as though they are a combination of stories from various recent wars and tortured movie plots, however in reality they are the stories of many women who have made allegations of various types of sexual abuse against U.N. peacekeepers in the Congo. These stories are not uncommon, and indeed typify what the U.N. describes as the problem with placing troops like peacekeepers in a wartime setting: social upheaval and instability, coupled with the economic position of the peacekeepers, creates an environment where peacekeepers can easily prey on those they should be protecting.⁵⁵

The allegations of abuse in the Congo are actually more sordid and distasteful than the above vignettes, and implicate not only the peacekeeping forces but also the U.N. administration sent to the conflict areas with them.⁵⁶

48. FOX SPECIAL REPORT (Steve Harrigan reporting), *supra* note 12.

49. *Id.*

50. See Engstrand-Neascu, *supra* note 44 (noting that these acts usually take place in local hotel rooms).

51. See *id.* (explaining that many young girls in the Congo were enticed into prostitution for a few eggs, some bread, or some chocolate).

52. FOX SPECIAL REPORT, *supra* note 12.

53. *Id.*

54. *Id.*

55. See Engstrand-Neascu, *supra* note 44.

56. See Thomas P. Kilgannon, *Outside View: Peacekeepers or Predators?*, UNITED PRESS INTERNATIONAL, Feb. 15, 2005 (noting a portion of the U.N.'s Congo investigation report which blames the

An official's computer files were screened and found to contain pornographic images of the official with local children.⁵⁷ The same official was caught in a sting operation started by local authorities in which he attempted to engage in sexual activities with a local, very underage girl.⁵⁸ He could not be prosecuted by the local authorities, as he was deemed to fall under the peacekeeper exception, and was not prosecuted by his home country for his crimes either.⁵⁹ On the point of age, to date the youngest reported victim of abuse at the hands of the peacekeeper was seven years old at the time of the alleged abuse.⁶⁰ Under the terms of peacekeeper protocol before these allegations came to light, peacekeepers were forbidden to have relations with anyone who was under 18 years old.⁶¹

The Congo allegations were the result of both an internal U.N. investigation⁶² and news exposes by U.S. news programs "20/20"⁶³ and "Fox News."⁶⁴ The allegations make concrete the stories of victims through these accounts, both in news and on television, and it is easier to estimate the types of offenses the peacekeepers are alleged to have committed. However, there have been numerous allegations of abuse at other missions over the history of the U.N. peacekeeping operations which are not as detailed and provide murkier waters for lawyers looking at potential criminal charges.⁶⁵ Since the Congo allegations have surfaced, however, there has been more discussion of the past allegations in the media, and indeed an allegation made by a Haitian woman was picked up

sexual abuses perpetrated by peacekeepers in the Congo in part on "the absence of any programs for off-duty peacekeepers").

57. *Id.* (stating that a French official was implicated in an online pedophile operation).

58. *Sex! Shocking Sex at the U.N.!*, INVESTOR'S BUSINESS DAILY, Feb. 24, 2005, at A13 (explaining that the sting operation allowed the Congolese police access to the official's house, thus allowing them to discover that he had taped his activities with children and that he had filmmaking equipment set up in his bedroom).

59. *See generally* Kilgannon, *supra* note 56.

60. *See* FOX SPECIAL REPORT, *supra* note 12.

61. *See* Engstrand-Neascu, *supra* note 44.

62. *See* Deen, *supra* note 10 (explaining that the report, created under the watch of Jordanian Prince Zeid Ra'ad Zeid Al-Hussein, a Jordanian representative to the U.N., "says there is a widespread perception that peacekeeping personnel, whether military or civilian, who commit acts of sexual exploitation and abuse rarely if ever face disciplinary charged for such acts").

63. *See* Kilgannon, *supra* note 56 (crediting the 20/20 investigative team sent to the Congo with uncovering many important incidents of peacekeeper misconduct).

64. *See* FOX SPECIAL REPORT, *supra* note 12.

65. *See, e.g., Congress Probes UN Peacekeepers' Misconduct in Congo*, VOICE OF AMERICA NEWS, Mar. 1, 2005 (citing a top U.N. official as admitting that the allegations of peacekeeper misconduct are not limited to the Congo mission).

by the media in the days after the initial Congo story broke.⁶⁶ While the peacekeepers in the Haitian allegation were cleared of rape charges,⁶⁷ they were nonetheless found to have engaged in prostitution with the woman in question,⁶⁸ which constituted a breach of the peacekeeper policies and resulted in the peacekeepers being publicly sent back to their home countries.⁶⁹

B. Conflicting Messages

As stated above, the U.N. has maintained a prohibition on sexual relations between peacekeepers and locals under the age of 18,⁷⁰ and does not condone peacekeepers engaging in prostitution.⁷¹ What the U.N. does condone, and indeed accommodate, is easy access to condoms for peacekeepers,⁷² going so far as to provide them with pre-filled pouches when they are being briefed for their mission assignments.⁷³ The official reasoning for this program is the health and safety of the peacekeepers while they are on their assignments, using the logic that these are typically young men, and that "[b]oys will be boys."⁷⁴

The pouches are accompanied by the distribution of cards detailing how to protect oneself from contracting HIV/AIDS;⁷⁵ these cards are conveniently printed in over 10 languages for easy understanding.⁷⁶ These cards have a twofold purpose, the education of peacekeepers and the education of those living in the areas to which the peacekeepers are sent.⁷⁷ Interestingly, despite the attempts to educate the peacekeepers and provide them with protection, the U.N. does not require potential peacekeepers to be screened for HIV/AIDS before they are sent on peacekeeping missions.⁷⁸ While HIV/AIDS pre-screening is standard practice in at least the armed forces of the U.S. and U.K.,⁷⁹

66. *UN Peacekeepers in Haiti Cleared of Rape Allegations*, XINHUA GENERAL NEWS SERVICE, Feb. 25, 2005.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See Engstrand-Neascu, supra* note 44.

71. *See, e.g., U.N. peacekeepers in Haiti cleared, supra* note 66.

72. *See Kuhlmann, supra* note 16. Interestingly, the peacekeepers profiled in the Kuhlmann article are those bound for Eritrea where, as mentioned above, at least one U.N. official has recently admitted that there were instances of sexual abuse involving peacekeepers and local girls. *Id.*

73. *Id.*

74. Lynch, *supra* note 14.

75. *Id.*

76. *Id.*

77. *Id.*

78. Kuhlmann, *supra* note 16.

79. *Id.*

it is not necessarily the standard practice in the other U.N. member countries willing to volunteer troops as peacekeepers.⁸⁰ The lack of pre-deployment screening of peacekeepers by the U.N. is particularly disturbing when one notes that in recent years many of the peacekeeping missions have been comprised of troops from countries where HIV/AIDS infection rates are rising at catastrophic rates,⁸¹ and affecting a large portion of the population.

However well intentioned the peacekeeper pouches might be, they appear to have limited success rates in stopping either the transmission of HIV/AIDS to the local populations or the fathering of children with women from the local population.⁸² Turning to the HIV/AIDS transmission issue, at least one study has charted an alarming correlation between the deployment of U.N. peacekeepers from countries with high and steadily increasing HIV/AIDS infection rates and an increase in the rates of locals infected by HIV/AIDS after the arrival of the peacekeepers.⁸³ The poignant vignette above of the new mother discovering that she and her entire family are infected because of an act by a U.N. peacekeeper⁸⁴ is a dreadful example of this trend, and sadly is not a rare story in the Congo.⁸⁵ Given the availability of both the empirical evidence and human tragedies, the U.N. policy of voluntary HIV/AIDS testing is even more disturbing and calls the peacekeeping administration into further question.⁸⁶

Turning to the local pregnancy issue, there are media accounts and internal investigation data to support the conclusion that instances of U.N. peacekeepers fathering children with local women, or girls, and then leaving without assuming any parental role or financial responsibility are far from rare.⁸⁷ Not only do these peacekeepers fail to take any responsibility or make any financial accommodations for their children, the U.N. fails to do either of these as well.⁸⁸

To conclude, the abuse allegations have done more than undermine the U.N. administration and the credibility of the peacekeeping mission. These abuses, alleged though they are at present, if true, have taken childhood from countless young girls- and in some instances boys- and replaced it with physical and psychological pain and torment. Many of these young victims face social

80. *Id.*

81. *Id.*

82. See FOX SPECIAL REPORT, *supra* note 12.

83. Benny Avni, *Monitoring HIV in U.N. Peacekeepers*, THE NEW YORK SUN, Jan. 24, 2005, at 7.

84. See FOX SPECIAL REPORT, *supra* note 12.

85. *Id.*

86. See Avni, *supra* note 83.

87. See FOX SPECIAL REPORT, *supra* note 12.

88. *Id.*

ostracism both now and in the future as a result of what happened to them.⁸⁹ The women who have peacekeeper-fathered children find themselves in much the same predicament, and are forced to struggle even more for survival after the arrival of the peacekeepers than before the peacekeepers arrived in the area.⁹⁰ And those who contracted HIV/AIDS from the peacekeepers face a myriad of consequences and problems as a result of their infection. Some, like the young woman in the vignette, are faced with the knowledge that they and their families are condemned to live with, and likely die from, the disease.⁹¹ Others will not know that they are ill until their health deteriorates, and could potentially pass on the disease further. Still others will know their status and have to try to be productive members of their society and hope that they will not be shunned by their families and community because of the disease and the way it was contracted, while at the same time struggling to find medical treatment if available. None of these scenarios arise out of a quest for peace, and all that they do is engender hatred and suffering, undermining the concept of the U.N. in general, as well as peacekeeping, and also undermining the likelihood that U.N. peacekeepers will be allowed in the area again should they be needed. In no way can these abuses be seen as maintaining international peace and security, and indeed in many ways these abuses are the same as the atrocities which were deemed to pose a threat to peace and security occasioning the deployment of the peacekeepers in the first place.

IV. INTERNATIONAL LAW AND PEACEKEEPING

A. Current Law Affecting Peacekeepers

Just as peacekeeping missions are manned by troops from around the world, so too is the law pertaining to peacekeepers global in its composition. The global quality of applicable law is due to the fact that, in such instances as peacekeeper sexual abuses or other misconduct, peacekeepers are not subject to the laws of an international body, but rather are to be tried, if at all, in their home countries and under the military law of their home country.⁹² The most the U.N. administration can do in such a situation is to strip the peacekeeper of

89. *Exploitation of Women by UN Peacekeepers in Congo Widespread*, THE PRESS TRUST OF INDIA, Jan. 8, 2005.

90. *Id.*

91. See FOX SPECIAL REPORT, *supra* note 12.

92. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute].

his position and send him back to his home country.⁹³ Indeed, the U.N. itself does not make it a practice to chastise the member countries which send abusive peacekeepers because of the fear that it will lose a source of volunteer peacekeepers if it offends the sending nation.⁹⁴

Once in the home country, the peacekeeper is then subject to the military laws of his country, which include the use of discretion in the decision of whether to prosecute the peacekeeper.⁹⁵ A problem for both the home country in making its decision regarding prosecution and the U.N. administration in evaluating the extensive nature of the abuses, is the local language barrier,⁹⁶ as well as the difficulty of trying a case where the victim is in a far away and impoverished nation, and not likely to testify before a court even if she could be brought there due to the potential familial and societal reprisals and ostracism she could face.⁹⁷

The problem with the state of the law as it relates to peacekeepers is not limited solely to the above, however, as there is also a grave and constant possibility of uneven administration of justice against peacekeepers at the same mission, charged with the same crimes, who are from different countries which have different military laws or different propensities for prosecuting peacekeepers.⁹⁸ An example from the current Congolese abuse allegations is the difference between the fate of a French peacekeeper implicated in the abuse who went to trial in France when he was returned,⁹⁹ and two South African peacekeepers who are still being held, but who have not been tried.¹⁰⁰ In addition, different national legal systems have different concepts of pre-trial rights and procedure, due process and fair trials, and jury use, leading to different outcomes for the same crime.¹⁰¹ The author would argue that, to those

93. See Linton, *supra* note 7.

94. *Id.*

95. Following the initial U.N. investigation of the Congo mission, it repatriated three men: a French support staff member and two Moroccan peacekeepers. Turner, *supra* note 8. Due to the differences in law and public policy between the two countries, however, only the Frenchman was put on trial. *Id.*

96. The multi-national quality of the peacekeeping missions, as well as the destitution of many areas where peacekeepers are stationed and the very real possibility that the victimized children have not been able to attend school and learn a common language with the peacekeepers due to the hostilities in their country can easily lead to a language issue.

97. See, e.g., *Editorial: Peacekeepers as Abusers*, VOICE OF AMERICA NEWS, Dec. 24, 2004 (providing, as an example, a twelve year old Congolese girl who is reluctant to tell ever her family what happened to her at the hands of a peacekeeper, stating "I didn't tell my mother because she would beat me.").

98. See generally KNOOPS, *supra* note 3 (explaining the applicability of current law to U.N. peacekeepers).

99. See 'Exploitation of Women by U.N. Peacekeepers in Congo Widespread,' *supra* note 119.

100. *Id.*

101. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

who created and ran the Nuremburg trials as a model of international criminal law, this very fact would be offensive.

Additionally, as soldiers in the national army of their home country prior to their peacekeeping assignment, there is a very strong likelihood that peacekeepers are familiar with the crimes and punishments used in their military courts. The author further submits that this is dangerous in that a peacekeeper from a home country with a nascent military and military law, or one who knows that sentences for sexual abuses are relatively light, or one who knows that there is a precedent of not prosecuting errant peacekeepers, will take comfort in that knowledge and feel less inhibited in his abuses, safe in the knowledge that he will not face serious charges at home. If nothing else, this undermines international peace and security in already troubled areas, and presents the very prescient threat that the local population will be victimized by a peacekeeper with such knowledge.

B. Problems With Extending the ICC Statute to Peacekeepers

The creation of the current ICC statute has codified many of the serious and yet esoteric crimes created at Nuremberg, such as war crimes and crimes against humanity.¹⁰² By providing lawyers and litigants with actual definitions of these crimes, including elements, the ICC statute has both clarified the state of international crimes on a grand scale and made the ability to prosecute peacekeepers for abuses essentially non-existent.¹⁰³ Doubtless there will be calls to subject U.N. peacekeepers to the jurisdiction of the ICC for abuses and do away with the home country military law rule currently in place. However, a closer look at the ICC statute reveals that there is a very small likelihood of successful prosecution of individual peacekeepers under the statute.¹⁰⁴ Further, should a loophole be found, or should the statute be amended to allow for individual prosecutions of peacekeeper abuses, the structure of the ICC procedures¹⁰⁵ is such that the ICC is not the proper place to try the peacekeepers.

71-137 (2001) (explaining the many substantive and procedural differences in trial rights which had to be reconciled between member states in drafting an ICC statute which the majority could agree on).

102. See generally PERSICO, *supra* note 27 (describing the criminal charges brought against the Nazi regime by the Nuremberg prosecutorial staff).

103. See Rome Statute, *supra* note 92, pt. 2 (defining the crimes which the ICC has the jurisdiction to prosecute).

104. *Id.* (providing for individual prosecution of crimes which are part of a concerted effort or plan, rather than those which are indiscriminately carried out for personal gratification or other non-concerted reasons).

105. *Id.* pts. 4-8. (providing the framework of the court apparatus, pre-trial procedure, trial procedure, and appellate rights and procedures).

As a threshold issue, it is very true that both war crimes and crimes against humanity under the ICC include sexual crimes and abuses such as rape.¹⁰⁶ This is certainly a laudable and appropriate provision, as sexual crimes and abuses are a sad and disturbing part of conflicts past and present; the problem is that as much as these provisions are a prosecutorial resource for such political actors and their underlings who have devised, ordered, and committed such grave crimes as those set forth in the ICC statute, these are not generally applicable to the peacekeepers based on the facts available at the present time. The problem with these provisions is that they require, if not a specific *mens rea*, at the very least that the actions be part of a larger plan targeted to the population in general rather than individuals in it.¹⁰⁷ This is more akin to a RICO conspiracy charge under U.S. law,¹⁰⁸ with the caveat that those being prosecuted all need the same *mens rea* and knowledge predicate of targeting a certain population for harm and destruction.¹⁰⁹

Under such a provision, in order to be prosecuted, peacekeepers would have to be found to have been part of a concerted and organized effort to rape or otherwise sexually abuse the local population with the goal of harming the population as a whole.¹¹⁰ However widespread the abuses are, it is highly unlikely that there was a specific U.N. protocol or plan to perpetrate sexual abuses on the local populations of the mission areas; it is also improbable that there was a specific plan in place at the mission level by U.N. staffers and administrators to do the same thing. The ICC statute is written in such a way that it would appear to turn a blind eye to the abuses because it provides no basis for prosecution of peacekeepers for war crimes or crimes against humanity unless the abuses were committed as an overall part of a plan to target the local

106. *Id.* pt. 2, art. 8 (b)(xxii) (defining a qualifying offense for a war crime charge as “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Convention.”); *Id.* pt. 2, art. 7 (g) (defining a qualifying offense for a crime against humanity charge as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”).

107. *Id.* pt. 2, art. 8 (b) (requiring that a war crime charge occur in a situation of international or, in certain circumstances, national conflicts in which international law provisions and expectations apply); *Id.* pt. 2, art. 7 (limiting the application of the crimes against humanity charge to situations where “any of the following acts [including sexual violence]. . . [are] committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”).

108. 18 U.S.C. § 1961 *et seq.* (2000). In contrast with the ICC *mens rea* and knowledge requirements, a person can be charged under RICO for acting in concert with others towards an illegal goal even if the knowledge of the goal and the other participants is not within the person’s possession. 18 U.S.C. § 1962(c).

109. *Cf. id.*; Rome Statute, *supra* note 92, pt. 2, arts. 7, 8.

110. Rome Statute, *supra* note 122, pt. 2 arts. 7, 8 (providing the *mens rea* and concerted action requirements, as well as the elements which comprise various crimes of sexual violence under the ICC statute).

population for abuse,¹¹¹ and it would appear unlikely that any of the U.N. administrators, commanders, or staffers could be prosecuted for the same reasons.¹¹²

Assuming that there is a way to read the ICC statute to allow the prosecution of U.N. peacekeepers individually for sexual abuses, or that the statute was amended to give the ICC prosecutorial jurisdiction over these cases, there are still several critical procedural flaws in the statute. First, not all U.N. member states are signatories of the ICC statute, and thus there would be an unequal prosecution of peacekeepers, akin to the current situation, if the ICC were used as a venue only for those peacekeepers whose home countries were ICC signatories.¹¹³ Second, given the way that the ICC statute is written and construed, the primary power of the court in getting a case to trial lies with the Prosecutor, who has much more power than his prosecutorial counterparts in many other countries, including U.S. civilian and military courts.¹¹⁴ Such a prosecutorial structure creates a situation which is ripe for over-discretion by the Prosecutor, and is even more dangerous when one considers that the Prosecutor can be from any country, including the home country of the peacekeeper.¹¹⁵ Third, as mentioned in the above section, the ability to have victims, or eyewitnesses, come forward to testify is hampered by the language, distance, and social gap.¹¹⁶ A corollary to that is that, unlike some adjudicative bodies such as the U.S. military courts,¹¹⁷ the ICC statute does not grant the ICC the

111. *Id.*

112. *Id.*

113. See Rome Statute, *supra* note 92; UNITED NATIONS, RATIFICATION STATUS OF THE ROME STATUTE (providing a list of countries which have and have not ratified the ICC statute), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited Apr. 22, 2005) (hereinafter RATIFICATION STATUS OF THE ROME STATUTE).

114. Rome Statute, *supra* note 122, pt. 2, art. 15 (allowing the Prosecutor ultimate discretion over which cases to bring to the Pre-Trial Chamber). Also, as the Pre-Trial Chamber is implicated in the prosecutorial decisions made, the allowance that the Prosecutor can still receive information a case which the Pre-Trial Chamber has said it cannot officially investigate (which can be argued to be a quasi-investigation in the first place), can be seen to implicate double jeopardy. *Id.* The double jeopardy implication can be seen to arise from the fact that the Pre-Trial Chamber is composed solely of judges, which lends an official judicial element to an opinion issued by the Pre-Trial Chamber which is not of the same low-level implication as judges deciding whether to grant arrest warrants. *Id.* at pt. 4, art. 39.

115. The qualifications for election to the Office of Prosecutor are set forth in the ICC statute, as are prohibitions against certain activities on the part of the Prosecutor and his staff. *Id.* at pt. 4, art. 42. While there are provisions requiring the recusal of the Prosecutor in certain cases, these provisions address current and past conflicts, including whether the Prosecutor had dealings with the same case or parties in another court, but are silent on shared nationality, ethnicity, or religion as a disqualifying factor. *Id.*

116. See *supra* Part III.

117. 10 U.S.C. § 847 (2000) (granting U.S. military courts subpoena power and making the failure or refusal to appear in court pursuant to subpoena or other method of requiring personal presence in court "an offense against the United States").

ability to subpoena or otherwise compel witnesses to testify before the court.¹¹⁸ While the image of forcing a young victim in front of a foreign court is not particularly attractive, the inability to compel the presence and testimony of witnesses, aide workers, other U.N. officials, and peacekeepers, or those who might have learned of the abuses through pictures or other descriptions, is a flaw to any prosecution and turns the prosecution into a he-said/she-said battle. Add to this the possible inability of young victims to positively identify their attacker beyond a reasonable doubt, and peacekeeper prosecutions at the ICC seem doomed to an uncertain, and inequitable, outcome under the procedural requirements set forth in the ICC statute regardless of their viability under the terms of the current crimes and elements codified in the ICC statute.

Ultimately, the ICC is not the proper jurisdiction for prosecution of peacekeepers on abuse charges of any type, and particularly sexual abuses. The ICC statute was created to codify the tradition of prosecuting those accused of political and military-political atrocities which started with the prosecutions at Nuremberg and evolved from that point.¹¹⁹ It was not created to try individuals for their separate crimes, apart from their complicity in a larger plan to harm or destroy a population.¹²⁰ Also, it is the author's belief that the ICC was intended to be used as a body for prosecution of internationally condemned ideas and beliefs, such as those which emerged from the conflicts in Yugoslavia and Rwanda, as reflected in the crimes and criminal elements codified in the ICC statute.¹²¹ If this is true, then the prosecution of U.N. peacekeepers at the ICC would be inappropriate because the ideas and beliefs espoused by the U.N. *vis a vis* peacekeeping as a whole are not likely to be viewed as morally or legally reprehensible, and thus are not within the realm of the intent to try a system, or organization, as well as the individual members of it.

118. The ICC statute requires that requests for persons, documents, and other information go through the member state. Rome Statute, *supra* note 122, pt. 9. There are several problems with this. First, if the accused is a resident of a non-signatory state to the ICC statute, or the pertinent information is located in a non-signatory state, the ICC statute would not appear to have any force or effect to bring the person or thing before the court. *Id.* Second, although the statute repeatedly mentions that the member state "shall" cooperate with requests for the extradition of people and production of documents, there is no penalty provision for failing to comply or withholding information from the ICC. *Id.* Third, and most important for the purposes of this paper, is the fact that NGOs, such as the U.N. and therefore U.N. peacekeepers acting in that capacity, are not signatories to the ICC statute. See RATIFICATION STATUS OF THE ROME STATUTE, *supra* note 113. This would mean that, unless the ICC statute were to be amended or revised, the ICC could not ask the U.N. to produce persons, documents, or other information; if the ICC did make such a request, there would be no requirement that the U.N. comply. *Id.*

119. See SCHARF, *supra* note 2, at 771-847 (describing the motivating factors which led to the creation and implementation of the ICC statute and the ICC).

120. Rome Statute, *supra* note 92, pt. 2, arts. 7, 8.

121. *Id.*

V. THE USCMJ AS APPLIED TO ALLEGED PEACEKEEPER OFFENSES

In contrast to the above description of the ICC statute and jurisdiction, were any implicated peacekeepers to be Americans (at present this is not the case), they would be subject to a well defined and precise trial, both in the elements of the crime itself and the trial and prosecution.¹²²

Unlike the ICC, U.S. military courts function to prosecute military personnel in all manner of crimes, from those relating to their commands or actions while on duty¹²³ to criminal acts involving non-military personnel.¹²⁴ The system functions to separate military personnel from standard civilian justice and govern them according to traditional laws regarding combat situations and situations in which U.S. personnel who are currently serving in the armed forces find themselves.¹²⁵ The prosecution of a soldier for acts amounting to war crimes is not an indictment of the U.S. military, its ideas and goals, but rather of the individual, or, in some occasions of a chain of command.¹²⁶

In terms of prosecuting the alleged sexual abuses by peacekeepers, the USCMJ would allow individual prosecution of soldiers for child abuse,¹²⁷ cruelty and maltreatment,¹²⁸ rape,¹²⁹ sodomy,¹³⁰ conduct unbecoming of an

122. See generally 10 U.S.C. § 101 *et seq.* (2000) (providing the text of military law and the USCMJ).

123. *Id.* § 801 *et seq.* (codifying the USCMJ, which applies to duty-related violations and conduct as well as soldiers' activities when they are not on duty but are still enlisted in U.S. military service).

124. *Id.*

125. *Id.* § 802 (enumerating the many classes of persons subject to the USCMJ, including active duty officers and military personnel, reservists, cadets and others training to be officers, retired military personnel still receiving some kind of compensation or hospitalization treatment from the U.S. military, those incarcerated after a previous court-martial, staffers of various government agencies and organizations who are working in conjunction with the military, prisoners of war, persons from political entities other than the U.S. who are assigned to U.S. military units abroad (unless these persons are exempted by treaty), to name just a few).

126. See generally *id.* § 801 *et seq.* (providing the crimes under which persons subject to the USCMJ can be charged, as well as the elements necessary for a conviction on these crimes).

127. *Id.* § 843 (detailing a "child abuse offense" under the USCMJ as "an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes" rape, sodomy, aggravated assault, "indecent assault, assault with intent to commit murder, voluntary manslaughter, rape, or indecent acts or liberties with a child).

128. *Id.* § 893 ("Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."). The terms of this statute could be applied to peacekeepers on the theory that those in the affected areas to which the peacekeepers have been dispatched are "subject to [their] orders" both because of the need for the locals to cooperate with the peacekeepers to obtain services and protection from the U.N. and because of the ability of the peacekeepers to use force against those who do not follow their orders and are seen as posing a threat to the peacekeepers and the peace in general.

129. 10 U.S.C. § 920 (2000). The definition of rape provided under the statute is very broad, and the

officer and a gentleman (a crime which could be applied to the abandonment of children fathered in the course of peacekeeping),¹³¹ and sexual harassment.¹³² All of these charges are made against the individual,¹³³ and the USCMJ also provides the basis for an accessory after the fact prosecution should it be alleged that a member of the peacekeeping staff became aware of the abuse after it was committed and yet did nothing to report it or otherwise stop such abuses from happening.¹³⁴ In this way, the USCMJ would allow for fair prosecution of the individual, and hold the rest of the mission accountable for knowledge of abuses after the fact, while not in any way indicting (whether in fact or implication) the mission and idea of the U.S. military as a whole or, by extension, the peacekeeping mission as a whole if applied in that context.

Turning to the more procedural aspects as the USCMJ, the accused has the knowledge that the prosecuting officer is a member of the military as well, and does not have the same all-encompassing powers as an ICC Prosecutor.¹³⁵ Additionally, the USCMJ does not require judicial approval of an investigation

affirmative defense provided in the statute—mistake as to the age of the victim—would not apply to the peacekeeping allegations in the Congo because there is a reasonability requirement for the belief that the woman involved was of legal age. *Id.* Given the very young age of the accusers, it is highly unlikely that such a defense would be feasible or successful in a court-martial.

130. *Id.* § 925. Again, this is a very broad statute in terms of the definition of the crime and the degree to which the act must have been carried out before a charge can be brought. *Id.*

131. *Id.* § 933 (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming of an officer and a gentleman shall be punished as a court-martial may direct.”).

132. *Id.* § 1561 (2000). This statute is interesting for the purposes of the peacekeeper discussion for two reasons. First, the definition of sexual harassment, while limited to the workplace, could be applied to any local women who might have been employed by or in the peacekeeping mission. *Id.* Second, this statute is equally applicable to military personnel and civilians alike, thus providing double protection for any local women (or indeed any peacekeeping officials or other personnel) against unwanted attention and advances. *Id.*

133. *See id.* §§ 843, 920, 925, 933, 1561. The only exception to this is a provision in 10 U.S.C. § 1561, the sexual harassment statute, which makes the commanding officer or supervisor guilty of a crime if sexual harassment reports are not investigated or ignored, or such behavior is exhibited in front of the commanding officer or supervisor and no action is taken. *Id.* § 1561. However, the statute does specify the method in which complaints against an individual are to be handled, and makes it clear that sexual harassment is a crime under the USCMJ that is punishable by court-martial. *Id.*

134. *Id.* § 878 (“Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.”).

135. 10 U.S.C. §§ 830–835 (2000) (providing the requirements of pre-trial procedure in cases which are subject to the jurisdiction of a court-martial).

before it occurs,¹³⁶ as is the case with the ICC statutory provisions.¹³⁷ The accused also is given the right to counsel who is also a military officer and is versed in the laws of the military itself.¹³⁸ In terms of witness production, the USCMJ specifically allows the military courts to legally require witnesses to appear before the court and testify,¹³⁹ under threat of prosecution if they do not in fact appear.¹⁴⁰

The USCMJ and military courts have a long history due to their age and continued use throughout U.S. history, and a concise history of cases illustrating the above points is not within the scope of this paper. However, it is important to note such a history, as it allows prosecution for acts such as the alleged peacekeeper abuses, and thus provides both the prosecution and the defense in such a situation with guideposts for trial and appeals, as well as with a standard body of law which can be relied on and which is not in flux due to the volatile nature of the subject matter and political climate, as could be the case with the ICC.¹⁴¹

VI. SUGGESTED CHANGES TO THE PEACEKEEPING APPARATUS

The current abuse allegations against U.N. peacekeepers in the Congo present two interrelated yet distinct situations which need to be addressed in order to assure that there is justice for the unwilling victims of abuse and a legitimate and respected body to assist in peacekeeping activities in the future. Each of these situations will be addressed separately.

A. Short Term Changes and Solutions

The short term goal of the UNSC, particularly the permanent members who gave rise to the U.N. in the beginning, must be to provide the victims of abuse with counseling and medical assistance, as well as the promise that there will be justice for them. These steps are not only humanitarian gestures, they are

136. *Id.* Under the USCMJ, a full investigation must be made into the allegations prior to any proceeding in front of a military judge. *Id.* In fact, before a trial can be ordered the investigatory body must clear the charges and the results of the investigation with a staff judge advocate. *Id.* § 834.

137. *See supra* Part IV B.

138. 10 U.S.C. § 832 ("The accused shall be advised of the charges against him and of his right to be represented at that investigation [where the determination of whether to proceed with a formal charge and court-martial request is made] by counsel.").

139. *Id.* § 846 ("Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue.").

140. *See id.* § 847 (making it a violation of the USCMJ to fail to appear or produce evidence when the court-martial or other military court has subpoenaed the witness or the evidence).

141. *See supra* Part IV B.

indeed necessary to preserve some semblance of credibility for the peacekeeping concept and the U.N. as a larger entity.

The provision of counseling and medical assistance to victims is a weighty task given the fear and reluctance of victims, especially children, to come forward, and should be the task of trained child psychologists and other mental health professionals with documented experience. The author suspects that the best candidates for this job would be female doctors, as the trauma of seeing male doctors who remind the victims of their attackers could be counterproductive to the attempted medical assistance. Counseling and medical assistance must also be made available to the families of the victims so they can understand the trauma suffered by their family member, and, where appropriate, receive medical assistance and treatment themselves. Further, the peacekeepers who fathered children with local women must be found, if possible, through such measures as mandatory DNA tests, and made to take care of their children and the women with whom they fathered children. If identification is not possible, lifetime care for these women and children should be provided by the U.N. itself. The author proposes that the counseling, medical treatment, and palimony be funded by the nations which contributed abusive peacekeepers.

It is clear from the evidence that, while the U.N. investigation of the alleged abuses was being conducted, further abuses were being committed by peacekeepers in the very areas under investigation.¹⁴² Not only does this evince both questionable judgment and a sense of being above the law on the part of the abusive peacekeepers and members of the mission administration, it also implicates the faith one can have in reformation of peacekeeping missions without some additional oversight. Therefore, the permanent members of the UNSC, or at least two of these members, should send envoys from their own military corps to oversee the conduct of the peacekeepers, as well as the creation of secured missions where the comings and goings of the peacekeepers would be heavily monitored. Evidence from victims indicates that a frequent method of enticing women and children to prostitute themselves was with the promise of obtaining payment in food, which they would use to feed their starving families.¹⁴³ With this in mind, the peacekeepers should not be allowed to have access to excess food or other supplies, and access to facilities where food and other commodities are stored must be under heavy surveillance at all times.

Legally, the home countries of abusive peacekeepers must actively prosecute the peacekeepers, and the U.N. must repatriate these peacekeepers to their home countries so that the prosecutions can start. Although the victims will still be forced to deal with uneven justice based on the nationality of their abusers, they must still be given the fullest possible justice allowed under the

142. *U.N. Peacekeepers Abused Women, Claims Watchdog*, MORNING STAR [U.K.], Jan. 8, 2005.

143. *See supra* Part III A.

legal system of their abuser. To that end, it is imperative that the U.N. release to the public at large the identities of the home countries of the abusers, and put pressure on these countries to vigorously prosecute the abusive peacekeepers. Indeed, these countries should be subject to economic sanctions and removed from eligibility to send any further peacekeepers (as well as forced to recall all current peacekeepers) should they fail to prosecute the abusers to the fullest extent allowed under their legal systems. While this might sound excessive, countries which are heavily dependent on the U.N. and its subsidiary agencies for commercial, infrastructural, humanitarian, and other aid are not likely to ignore the threat of a sanction, regardless of their past precedents in prosecuting allegedly abusive peacekeepers.

To say that these suggestions are anything more than remedial and stop-gap measures would be clearly erroneous, however in the short-term, such measures are a good option because they validate the rights of the victims and the ideal of the preservation of peace and the importance of humanitarian actions and policies upon which the U.N., and later the U.N. peacekeeping missions, was founded.

B. Long Term Apparatus Changes

Peacekeeping missions in the abstract are a vital expression of the ideas and goals of the U.N., and the humanitarianism of its members. The key to the future of peacekeeping missions is to re-examine the original provisions of the U.N. Charter before the peacekeeping mandate was inferred into the Chapter VI provisions.¹⁴⁴ In so doing, the theme of a separate military force under the joint command, and ultimate control, of the UNSC emerges as the intent of the framers of the Charter.¹⁴⁵ Certainly it seems unlikely that a separate U.N. military would come to fruition as the fighting force of its member states, especially when these member states are frequently those going to war with each other and/or committing humanitarian atrocities against groups of people.¹⁴⁶ However, it is the author's position that if the concepts of the Charter were combined with the inference of a peacekeeping force, there would be a peacekeeping apparatus which would be effective, structured, and able to punish and prevent abuses like those seen in the Congo.

By creating a joint command premised on the Joint Chiefs of Staff model used by the U.S. military, there would be a greater deal of accountability and coordination between the mission commands. Under this structure, member

144. See *supra* Part II.

145. *Id.*

146. For example, Iraq was, and still is, a member state of the U.N. Even were there to be general consensus regarding the need for force, the possibility of having such a force take action against the member state could easily become fractious.

states would not volunteer their soldiers for peacekeeping duty, rather the U.N. military force would actively recruit both interested civilians and current military personnel from around the globe to join the force. This would require that the recruits forsake the laws of their home country, whatever it might be, and agree to be subject to the jurisdiction of the military court for the force, thus solving the uneven justice problem and preventing the possibility of legally savvy peacekeepers being more likely to commit abuses knowing that they will not face severe punishments in their home country's military court.

In terms of the military law used, as between the laws of the permanent members of the UNSC the most similar legal systems are those of the U.S. and the U.K., and accordingly, for stability and ease of adapting these laws to the force, those should be used as the code for the U.N. military force. This would reconcile the issues with the current legal status of peacekeepers and the application of the ICC statute to U.N. peacekeepers with the guaranteed prosecutorial abilities and procedural benefits found in the USCMJ.¹⁴⁷ By adopting laws which have cases establishing precedent, the lawyers involved in the prosecutions on both sides would have a better knowledge and understanding of how to argue their cases, and judges would have a far better understanding of how to apply statutory law.

Along with the U.N. military force there would have to be a recruitment and screening process for all civilian staff members, and an office specifically for the oversight of peacekeeper activities and interaction with the local populations must be created and well staffed. This office should be charged with, among other things, educating the local community about the proper and improper actions of peacekeepers, and how and where they should report any instances of inappropriate conduct by the peacekeepers. All of these suggestions would rather obviously require funding, which the author submits should not go directly through the U.N., especially in the wake of the oil-for-food scandal.¹⁴⁸ Rather, the permanent UNSC members alone should fund the U.N. military force with contributions which are commensurate to their contributions as of 2005. As a corollary, the contributions of each of the permanent UNSC members would then be significantly reduced to accommodate the funding of the peacekeeping operation. Since one of the primary tasks assigned to the permanent UNSC members is the maintenance of "international peace and security," and since this task requires a robust peacekeeping and military force, the permanent members' first financial responsibility should be the creation and

147. See *supra* Part V.

148. See Phil Hirschorn, *Texas Businessman Indicted in U.N. Oil-For-Food Probe*, CNN.COM, Apr. 15, 2005, available at <http://www.cnn.com/2005/LAW/04/14/oilfood.indictment/index.html> (last visited Apr. 22, 2005).

maintenance of an organized, legally accountable, and morally respected U.N. military force.

In terms of the troops themselves, recruits must be carefully screened and vetted before they are allowed to become peacekeepers. Key among the screening processes must be the mandatory taking of an HIV/AIDS test before and during deployment. In the event that any fathering issues should arise, pictures of the peacekeepers must be maintained on file, and all deployed peacekeepers and accompanying personnel must be required to give a DNA sample prior to deployment. Should any peacekeeper alter his appearance while deployed or prior to deployment, he should be required to resubmit a photograph. These measures do tend to go into some of the private realm which civil libertarians, especially in America, tend to hold dear, however, in order to rehabilitate the peacekeeping idea and ensure that it can exist in a functional and helpful way, these steps must be taken. The world, and particularly the victims, must be assured that such allegations of abuse by peacekeepers do not occur again.

VII. CONCLUSION

In sum, the concept of a U.N. peacekeeping force evolved from a somewhat questionable interpretation of the U.N. Charter to both win the Nobel Peace Prize and to become known for truly abominable sexual abuses of those it was charged with protecting. This dichotomy has been in no way helped by the uneven legal fates which await abusive peacekeepers when they return to their home countries. The idea of using the ICC to prosecute these errant peacekeepers does not provide the victims with a real chance at having substantive charges brought against the peacekeeper who abused her, and does not provide either the prosecution or the defense adequate procedural and fairness safeguards before and during the trial. In contrast to these substantive and procedural issues with using the ICC statute stands the USCMJ—a well-established legal system that would allow for prosecution of peacekeepers as individuals and contains crimes which fit those allegedly committed by the peacekeepers, while guaranteeing procedural adequacy and fairness to the prosecution and the defense in a less politically charged atmosphere than the ICC. The USCMJ does not investigate or prosecute the ideas of the institution which created and deployed the peacekeepers, rather it investigates and prosecutes those peacekeepers who have violated the law. In so doing, the individual is brought to justice, while the institution itself can point to the prosecution of an errant member as evidence that it too condemns the act and that the act is not a part of the value set and goals advanced by the institution. This protects the contributions of those members of the institution who truly believe in its goals and have fought and sacrificed for the institution, at the same time that it protects future

local populations from facing the prospect of allowing in potential predators or not electing to allow in peacekeepers who might otherwise save their society.

The suggestions made in this paper aim to reconcile the two elements present in international peacekeeping missions, especially where there are problems within the mission: humanitarianism and law. One can have humanitarianism and no law and generate a system much like the current U.N. peacekeeping system, which is besmirched by the horrid allegations of abuse made against peacekeepers, and leaves a legacy of uneven justice for victims. One can have law and no humanitarianism and end up with a dusty book of statutes sitting in a library, an ancient relic never used because there was never sufficient societal interest in the concept to create a peacekeeping force to govern. Or, one can combine the two and have a system that benefits humanity not only through its acts but also through its assurances of even and fair justice. That is the combination which will allow the idea of international peacekeeping to flourish.

THE EVOLUTION OF THE EUROPEAN LEGAL SYSTEM: THE EUROPEAN COURT OF JUSTICE'S ROLE IN THE HARMONIZATION OF LAWS

*Yvonne N. Gierczyk**

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"We must build a United States of Europe." Winston Churchill!

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1. Winston Churchill, Speech at Zurich University (Sept. 1946); See GEORGE A. BERMAN ET AL.,

I. INTRODUCTION

After the dust settled from World War II, Winston Churchill declared the need for Europe to integrate economically and politically. Integration promised not only peace, but the means by which Europe could remain a world power. The European Union (EU) is considered by many the answer to Europe's post-war condition.² The creation of a common market in 1992, a single monetary unit in 1999, and the latest induction of Eastern European countries in 2004 demonstrate the success of the EU.³ With the impending ratification of the Treaty Establishing a Constitution for Europe,⁴ it is clear that the European Union has evolved from a mere free trade agreement⁵ to an economic and political union.⁶ Fundamental to the formation of an integrated Europe has been the creation of a common legal system.⁷

CASES AND MATERIALS ON EUROPEAN UNION LAW 4 (West Group 2d ed. 2002) (1993) (giving context to Churchill's speech); See also JOHN CHARMLEY, CHURCHILL'S GRAND ALLIANCE 248 (1995).

2. *A Divided Union*, ECONOMIST, Sept. 25, 2004, at 14 [hereinafter "*A Divided Union*"].

3. JOHN VAN OUDENAREN, UNITING EUROPE: AN INTRODUCTION TO THE EUROPEAN UNION 11 (Rowman & Littlefield, Inc. 2d ed. 2005) [hereinafter UNITING EUROPE]; see generally BERMANN, *supra* note 1; The EU at a Glance, http://www.europa.eu.int/abc/index_en.htm (last visited Feb. 13, 2005) ("[The EU] has helped to raise living standards, built a single Europe-wide market, launched the single European currency, the euro, and strengthened Europe's voice in the world.").

4. See generally Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1; see also *A Divided Union*, *supra* note 2, at 10.

5. The seeds of the EU were planted in 1952 with the creation of the European Coal and Steel Treaty (ECSC). BERMANN, *supra* note 1, at 5. France, Germany, Italy, and the three Benelux countries designed the ECSC Treaty to ensure that Germany would not develop a supply of weapons. *Id.*

6. See Reinhard Zimmermann, *The "Europeanization" of Private Law Within the European Community and the Reemergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63, 73 (1995) (referring to the movement towards integration with the passage of the Single European Act, the Maastricht Treaty, and stating "[o]bviously, therefore, the political will exists to advance the process of European integration on an economic, political, and cultural level; and it appears to be perfectly appropriate to facilitate this process by striving towards legal unity."); see also CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS*, 6 (2004) ("The history of the EU lends support for neo-functionalism as an explanation for the integration process – in less than fifty years the EU has moved from being merely a coal and steel community to now a major economic and monetary union.").

7. See Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 121 (2001) ("The feasibility of a coherent European economic system inevitably depends on a coherent European legal order," quoting Eric Stein, *Assimilation of National Laws as a Function of European Integration*, 58 AM. J. INT'L L. 1, 29 (1964)); see also George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125, 127 (2004) ("Uniform interpretation of law reduces distortions of competition and promotes economic efficiency");

Historical experience has demonstrated that a common market or free trade area cannot operate smoothly without certain generally recognized rules and procedures, without

The task of unifying European nations with different languages, legal systems, and sordid pasts represents a significant hurdle to achieving harmonization of laws.⁸ The European Court of Justice (ECJ) through Article 234 (ex Article 177) of the Treaty of Rome,⁹ the preliminary ruling procedure, has been the main facilitator in the legal integration of Europe.¹⁰ Although grounded in the civil tradition, the ECJ's interpretation of Article 234 bestows its decisions with the power of precedents. Thus, by borrowing from the common law tradition, the ECJ has created a system of integration by adjudication. This comment seeks to illustrate the evolution of the European legal system as a part of the evolution of the European Union, and the ECJ's key role in the harmonization of laws via Article 234.

Part II provides a background on the ECJ. Part III introduces Article 234 and explains how the preliminary ruling system functions. Part IV analyzes the ECJ's expansion of jurisdiction by giving its decisions the power of precedent through Article 234. Part V addresses how Member States allowed for this expansion of power. Part VI concludes by discussing the evolution and harmonization of the European legal system as part of globalization.

a core of common legal institutions and convictions Legal unification has also always been both stimulus for and consequence of political unification, and as a cultural phenomenon it serves to strengthen the feeling of provincial, national or supranational identity.

Zimmermann, *supra* note 6, at 73; Geoffrey Garret, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998).

8. See UNITING EUROPE, *supra* note 3, at 15 (stating that "the EU of today has twenty-five members and twenty official languages using two alphabets, the Greek and Roman. Economically, culturally, and socially it is far more diverse than the Carolingian Europe of 1957."); see also Curran, *supra* note 7, at 121. ("Scratching the surface of the European Union's legal system might bring into view a juridical Tower of Babel, due to the clash of discordant legal cultures between the two principal, divergent legal systems coexisting in the European Union: namely, the common-law and civil-law systems."); see also Zimmermann, *supra* note 6, at 65 (noting that "for the past two hundred years or so there have been, in principle, as many legal systems (and, consequently, legal sciences) in Europe as there are nation states.").

9. Treaty Establishing the European Community, Feb. 7 1992, U.J. (C224) I (1992), [1992] 3 C.M.L.R. 573 (1992) [hereinafter EEC Treaty].

10. Francis G. Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEX. INT'L L.J. 547, 550 (2003) ("It is probably true to say that, over the first thirty years of the EEC, the case law of the ECJ made a more significant contribution to European integration than any other development over that period."); see also Matthew T. King, Comment, *Towards a Practical Convergence: The Dynamic Uses of Judicial Advice in United States Federal Courts and the Court of Justice of the European Communities*, 63 U. PITT. L. REV. 703, 723 (2002) ("Article 234 (then 177) 'is essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community,'" quoting the ECJ's opinion in Case 166/73, *Rheinmuhlen-Dusseldorf v. Einfuhr*, 1974 E.C.R. 33)).

II. THE EUROPEAN COURT OF JUSTICE

The Treaty of Rome created the ECJ in 1957 to resolve disputes concerning the European Community (EC) Treaties and assist national courts in the uniform application and interpretation of EU laws.¹¹ The ECJ is charged with the duty of interpreting treaties and making sure that Member States comply with EU law.¹² "The over arching obligation of the ECJ is, in this view, to pursue the primary objective of the EC Treaty as set forth in the Preamble: 'an ever closer union among the peoples of Europe.'"¹³

The ECJ holds four powers:

- 1) judicial review;
- 2) answering preliminary questions under Article 234;
- 3) answering administrative questions regarding EU personnel;
and
- 4) reviewing decisions of the Court of First Instance (CFI).¹⁴

This discussion focuses on the second power, the preliminary ruling procedure under Article 234, which represents the majority of the ECJ's work.¹⁵

While it might seem natural to draw an analogy that the ECJ is to the EU what the Supreme Court is to the United States, "the Treaty of Rome did not provide for the establishment of a Supreme Court."¹⁶ Unlike the United States Supreme Court, which hears appeals from lower courts, the ECJ does not hear appeals from lower courts because there are no lower courts, with the exception

11. Kevin Andrew Swartz, Note, *Powerful, Unique, and Anonymous: The European Court of Justice and Its Continuing Impact on the Formation of the European Community*, 3 S. CAL. INTERDISC. L.J. 687, 691 (1994).

12. See BERMANN, *supra* note 1, at 58 ("Article 220 (ex 164) of the EC Treaty gives the Court the responsibility for 'ensur[ing] that the interpretation and application of this Treaty the law is observed.'").

13. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 701 (1999) (quoting preamble of EEC Treaty: "The internal market is the cornerstone of that 'ever closer union,' and together they constitute the very purpose—the 'telos'—of the EC.").

14. See generally BERMANN, *supra* note 1, at 58–71 (giving a detailed account of the ECJ facts, such as terms of judges, the composition of the court, and the Court of First Instance (CFI)). The CFI was created in 1988 to deal with the overload in the ECJ's docket). *Id.* at 65. It primarily hears cases dealing with private litigants, whereas the ECJ handles cases between Member States and EU institutions. *Id.* at 66. See also Justice Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1049–1051 (2000) (giving a simple explanation and background to the ECJ and how it works).

15. Breyer, *supra* note 14, at 1049; see also BERMANN *supra* note 1, at 352 (noting that referrals compose about half of the ECJ's case docket).

16. Tridimas, *supra* note 7.

of the CFI.¹⁷ “This is hardly surprising since the Community was not born as a federation but rather as a *sui generis* supranational entity with an open-ended integrative potential.”¹⁸

Because the other EC institutions exercise powers of execution and legislation to enforce the Treaty of Rome, it was “imperative that there should be some mechanism to ensure the uniform application of Community law throughout the Member States.”¹⁹ The possibility of national courts rendering different interpretations of the EC Treaties impedes the goal of economic and legal harmonization.²⁰ The only way for the EU to overcome 150 years of different constitutions and civil codes was to give the ECJ the power to overrule the national courts and establish a precedent that national courts would be obliged to follow.²¹ “That is, the EC relied on its adjudicative authority to give content, on a case-by-case basis, to the common market norms set forth in the Treaty.”²² Through Article 234’s preliminary ruling procedure, the ECJ was given “unifying jurisdiction.”²³

III. ARTICLE 234

A. General Description

Article 234 provides:

- 1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
 - a) the interpretation of the Treaty;
 - b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
 - c) The interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
- 2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon
- 3) Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision

17. See BERMANN *supra* note 1, at 65–70 (addressing the creation of the CFI to deal with the ECJ’s overloaded docket).

18. Tridimas, *supra* note 7.

19. *Id.*

20. *See id.*

21. *Id.*

22. Lindseth, *supra* note 13, at 662–63.

23. Tridimas, *supra* note 7.

there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.²⁴

Article 234 is a procedural device that "enables the ECJ, on request of national courts, to provide rulings on the interpretation and validity of Community law."²⁵ A preliminary ruling occurs when a national judge is confronted with a question demanding the application of EU law that is unclear.²⁶ Once the ECJ answers the question, the national court is bound by the ECJ's interpretation and "must apply the Court's ruling to the facts of the case."²⁷

Theoretically, the ECJ's ruling is only binding on the parties and the court that submitted the question.²⁸ However, in practice, the ECJ's pronouncements "are cast in general terms and have been held by the Court to apply to future cases."²⁹ As one scholar notes:

[D]espite the absence of a formal rule of stare decisis binding the Court of Justice itself, Article 234 rulings constitute binding precedents for national courts in later cases. Like other Court of Justice rulings, they allow Community law to acquire a determined meaning throughout the territory of the Community, and thus promote legal certainty and unity.³⁰

Article 234 is easily considered the "most important procedural rule of the Treaty"³¹ because it not only "facilitates dialogue between national courts and the ECJ,"³² but also "provides a meeting point between Community and national law."³³

24. EEC Treaty, *supra* note 9, at art. 234.

25. Tridimas, *supra* note 7.

26. BERMANN, *supra* note 1, at 354.

27. Swartz, *supra* note 11, at 692-93.

28. Case 52/76, *Benedetti v. Munari*, 1977 E.C.R. 163; Case 29/68, *Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken*, 1969 E.C.R. 165.

29. BERMANN, *supra* note 1, at 354; *see also* Joined Cases 28-30/62, *Da Costa v. Nederlandse Belasting-administratie*, 1963 E.C.R. 61 (discussing the *Da Costa* ruling by the ECJ, which in effect initiated a system of precedent *infra* note 51).

30. *Id.*

31. Tridimas, *supra* note 7; *see also* Martin Shapiro, *The European Court of Justice*, in *THE EVOLUTION OF EU LAW* 323 (1999) [hereinafter *EVOLUTION OF EU LAW*] (stating that Article 234 is considered the "crown jewel" of the ECJ's jurisdiction); Paul Craig, *The Jurisdiction of Community Courts Reconsidered*, 36 *TEX. INT'L L.J.* 555, 559 (2001) (describing "the ECJ's jurisdiction over preliminary rulings under Article 234 . . . is regarded as the jewel in the Crown of the existing regime.").

32. Tridimas, *supra* note 7.

33. *Id.* at 127-28.

B. How Article 234 Functions

A national court makes the initial determination of whether a question of Community law is pertinent to the case.³⁴ "The national court must consider whether or not the answer to the EU law question is necessary to formulate a decision in the case before it makes a discretionary referral under Article 234(2)."³⁵ Once the national court submits a question to the ECJ, regardless if the question is mandatory or not, the ruling is binding on the referring parties and court.³⁶

According to Article 234, national courts may ask for a preliminary ruling in only two circumstances: "1) a discretionary reference under Article 234(2); and 2) a compulsory reference under Article 234(3)."³⁷ The following discussion addresses the differences between these two scenarios.

A mandatory referral occurs when a question of EU law is presented and no judicial remedy exists under national law.³⁸ The only exceptions are: "1) the issue is irrelevant; 2) the Court has already addressed the question; or 3) the correct application of EC law is obvious."³⁹ Mandatory referrals may come from lower national courts when no judicial remedy exists.⁴⁰

Under an Article 234 preliminary ruling, the ECJ's role is simply to clarify the meaning of EU law and leave it to the national court to apply the law to the case at hand.⁴¹ Although the ECJ is to limit its analysis to EC law, the ECJ typically makes it clear how the national court should rule.⁴² The decision made

34. See Lisa Borgfeld White, Comment, *The Enforcement of European Union Law: The Role of the European Court of Justice and the Court's Latest Challenge*, 18 HOUS. J. INT'L L. 833, 847 (1996) (noting that "[t]he ECJ 'will refuse to accept a reference where it considers that the procedure is being abused by artificially contrived proceedings designed for the purpose of having Community law points decided'").

35. See *id.* (explaining that "[t]he ECJ wants the national court to consider the following when deciding whether to make a discretionary referral to the ECJ: '(i) establish the facts first; (ii) define the national law context of the Community law question; and (iii) explain the reasons why the question needs to be answered.'").

36. Tridimas, *supra* note 7, at 127-28.

37. White, *supra* note 34, at 846.

38. *Id.* at 847 (citing Article 234(3)).

39. *Id.*

40. *Id.* at 848.

41. *Id.* at 846.

42. John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT'L L. 1 (1996); see also Lindseth, *supra* note 13, at 663 (stating that "[d]espite the fact that national courts retained ultimate decisional power in a formal sense, often ECJ interpretations under the preliminary reference procedure effectively mandated a particular decision significantly constraining the effect of the Member State law in question.").

by the ECJ on the referred question is binding on the court and parties who made the reference.⁴³

While in theory this ruling is applicable only to the case at hand, "when an issue has been previously decided by a preliminary ruling in a similar case, the earlier ECJ decision has a legal effect."⁴⁴ Thus, if parties A v. B have a question answered via preliminary ruling, that ruling will apply to parties C v. D if they have the same or similar question.⁴⁵ Consequently, national courts will research ECJ jurisprudence before submitting a preliminary reference question to the ECJ.⁴⁶ If they find a ruling on a same or similar question, they will apply the principle laid out in the ECJ decision and cite the decision as precedent.⁴⁷ Section D, *infra*, discusses the ECJ case law which developed a precedent based legal system.

For many European civil countries, the practice of citing previous decisions as precedent is in itself a new precedent.⁴⁸ Only on very rare occasions does a French national court cite a previous decision to answer a question posed by a set of new parties, let alone citing the decision of another court.⁴⁹ The practice of national courts citing ECJ rulings as precedent is a revolutionary concept.⁵⁰ The result of citing precedent is the creation of a body of jurisprudence that has "independent supranational meaning, even on issues raised before national tribunal."⁵¹

C. Purpose behind Article 234

Article 234 Preliminary Ruling procedure "*is the cornerstone of the structure designed to secure a common meaning for Community law in all the Member States.*"⁵² Article 234 performs three important functions: "[f]irst, it

43. Tridimas, *supra* note 7 and accompanying text.

44. Fitzpatrick, *supra* note 42; see also BERMANN, *supra* note 1, at 354 (stating "though preliminary rulings only answer the questions put by a national court in a particular case, they are cast in general terms and have been held by the Court also to apply to future cases.").

45. Interview with Isabel Fernández de la Cuesta, EU Law Specialist, in Houston, Tex. (Jan. 8, 2005) (on file with author) [hereinafter Interview with Fernández de la Cuesta].

46. See *infra* notes 95-97 and accompanying text (discussing Case 144/86, Gubisch Maschinenfabrik KG v. Giulio Palumbo, 1987 E.C.R. 4861, which was applied by a national court in Spain).

47. See *infra* notes 95-97 and accompanying text (discussing Case 144/86, Gubisch, 1987 E.C.R. 4861, applying the concept of *lis pendens* as defined by the ECJ in a Spanish court).

48. Interview with Fernández de la Cuesta, *supra* note 45.

49. *Id.*

50. *Id.*

51. Fitzpatrick, *supra* note 42, at 1.

52. King, *supra* note 10 (emphasis added).

ensures uniform interpretation of Community Law;”⁵³ second, “it ensures the unity of the Community legal order and the coherence of the system of judicial remedies established by the Treaty;”⁵⁴ finally, “it facilitates access to justice: it makes it clear that Community law is to be applied not only by the ECJ but also by national courts, thus enabling citizens to enforce their Community rights in the national jurisdictions.”⁵⁵

D. Case Law Developing Article 234

1. *Da Costa v. Nederlandse Belastingadministratie*⁵⁶

“*The Da Costa* case, therefore, initiated what is in effect a system of precedent.⁵⁷ In *Da Costa*, the ECJ was confronted with a case raising a question that had already been answered by the ECJ in a preliminary ruling.⁵⁸ *Da Costa* alleged the unlawful increase of a customs duty as prohibited by Article 12 of the EEC Treaty.⁵⁹ The Commission requested that the preliminary reference be dismissed because the question posed by *Da Costa* had already been decided by a previous judgment.⁶⁰ In response, the ECJ held that a national court is able to refer a matter to the Court, however, if the case does not raise some new factor or argument, the existence of an earlier ruling will dispose of the case.⁶¹

In *Da Costa* the ECJ made it clear that national courts could and should rely on previous decisions by the ECJ as a form of precedent.⁶² This implies that under the preliminary ruling system, “the ECJ directly influences national law through opinions delivered in the context of private disputes before national

53. Tridimas, *supra* note 7, at 128; see also King, *supra* note 10 (stating “Legal harmony is the primary benefit, and goal, of having all Member States refer Community issues to the ECJ.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 291 (1997) (noting that “[t]he ostensible purpose of this provision was to ensure uniformity of interpretation of the treaty by ensuring that six (now [nineteen]) sets of national judges did not develop divergent interpretations of the treaty and Community secondary legislation.”).

54. Tridimas, *supra* note 7, at 128; see also Vladimir Shifrin, *Article 177 References to the European Court*, 27 DENV. J. INT’L L. & POL’Y 657, 658 (recognizing that the “uniform interpretation of Community law is necessary for uniform application of Community law.”).

55. Tridimas, *supra* note 7, at 128.

56. Joined Cases 28–30/62, *Da Costa*, 1963 E.C.R. 61.

57. Paul Craig & Grainne De Burca, *EU Law: Text, Cases, and Materials* 440 (3d ed. 2003) [hereinafter Craig & De Burca, *EU Law*].

58. Joined Cases 28–30/62, *Da Costa*, 1963 E.C.R. 61.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

courts.”⁶³ In addition to influencing national laws, the Court shapes and develops Community laws via the preliminary ruling system.⁶⁴

2. Srl CILFIT v. Ministry of Health⁶⁵

If *Da Costa* initiated the system of precedent, then *CILFIT v. Ministry of Health*⁶⁶ served to reinforce it.⁶⁷ The *CILFIT* decision made it “clear that a case can be relied on even if the ruling did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical.”⁶⁸ In *CILFIT*, a textile firm claimed that the obligation to pay certain Italian duties violated an EU regulation.⁶⁹ The Ministry of Health urged the Italian national court not to submit a question to the ECJ because they claimed the matter “was so obvious as to obviate the need for a reference.”⁷⁰ However, because no judicial remedy existed under the Italian Court, the question became a mandatory referral under Article 234(3).⁷¹ The Italian Court requested a preliminary ruling on the matter.⁷²

The ECJ responded by addressing the issue of an *acte clair*⁷³ and “gave guidance on the relevance of its prior decisions.”⁷⁴ In relevant part, the ECJ ruled that “where previous Decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those Decisions, [and] even though the questions at issue are not strictly identical,”⁷⁵ national courts may rely on those decisions.⁷⁶

63. Fitzpatrick, *supra* note 42.

64. BERMANN, *supra* note 1, at 352.

65. Case 283/81 Srl CILFIT & Lannificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415.

66. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, 1982 E.C.R. 3415.

67. *Id.* See also CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450 (stating that “[t]he decision in *CILFIT* to reinforce precedent was surely not unintentional.” Case 283/81, 1982 E.C.R. 3415.).

68. *Id.* at 442.

69. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, 1982 E.C.R. 3415.

70. *Id.*

71. *Id.*

72. *Id.*

73. See generally CRAIG & DE BURCA, EU LAW, *supra* note 57, at 451 (describing the basic concept of the *acte clair* as a doctrine created by national courts which states that if a question of EU law is clear they are not required to submit that question to the ECJ); see also *id.* at 448 (discussing the acceptance of doctrine of the *acte clair* as part of the “give and take” between national courts and the ECJ. . . by “the ECJ accepting the *acte clair* doctrine, but placing significant constraints on its exercise” it “hope[d] that national courts would play the game and only refuse when matters really were unequivocally clear.”).

74. *Id.* at 441.

75. Case 283/81, Srl CILFIT & Lannificio di Gavardo SpA, E.C.R. 3415.

76. *Id.*

However, according to Article 234, preliminary rulings are only to bind the parties and court that present the question.⁷⁷ While the ECJ did not affirmatively state that previous decisions are binding on future parties in a strict sense, it basically said, “[w]e, the ECJ are not going to change our mind on the interpretation of EU law, so if you, national court, do not have a new question, we are going to give you the same answer as before.”⁷⁸ The *CILFIT* decision reinforced the notion of a uniform interpretation of EU case law.

In *CILFIT*, the ECJ expanded its authority under the Treaty of Rome, *ex post*, by directing national courts to treat their previous decisions as precedent.⁷⁹ By making its previous decisions binding on national courts, the ECJ is effectively rewriting the Treaty and explicitly giving its decisions the power of precedent.⁸⁰

IV. HOW THE ECJ GREW POWERFUL VIA ARTICLE 234

A. Overview

The shifting of supremacy in the ECJ legal system flourished with ECJ’s interpretation of Article 234.⁸¹ Through the ECJ’s reading and application of Article 234, the ECJ expanded its own power by promoting a *stare decisis*-like application of its rulings and strengthened the EU institutions by interpreting EU treaties beyond their originally intended scope.⁸² This expansion of power

77. See *supra* notes 28–29 and accompanying text (outlining the limits of Article 234 preliminary ruling under the EEC Treaty); see also CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450 (noting that “[t]hose rulings were now to have authority for situations where the point of law was the same, even though the questions posed in earlier cases were different, and even though the proceedings in which the issue originally arose differed.”).

78. Interview with Fernández de la Cuesta, *supra* note 45.

79. See CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450 (noting that “by expanding the precedential impact of past decisions, the ECJ thereby increased the authoritative scope of its past rulings.”).

80. *Id.*

81. EVOLUTION OF EU LAW, *supra* note 31, at 330.

82. See Lindseth, *supra* note 13, at 635.

Although purportedly an entity possessing only enumerated powers, the scope of the Community’s normative authority has steadily increased since its inception in the 1950s, partly due to explicit transfers from the Member States, but more importantly due to an expansive interpretation of Community competences by the Community institutions themselves, notably the European Court of Justice (ECJ).

Id. See also Ilann Margalit Maazel, *Mulloche v. Netherlands: A Marshallian Discourse on Modern Europe*, 35 UWLA L. REV. 1, 25 (2003) (stating that “given the power to define the Community’s sphere of competence, the ECJ has as yet under our analysis no historical, structural, or textual basis to interpret this sphere broadly.”); Aashit Shah, *The “Abuse of Dominant Position” Under Article 82 of the Treaty of European Community: Impact on Licensing of Intellectual Property Rights*, 3 CHI.-KENT J. INTELL. PROP. 41, 71 (2003) (“The ECJ has often been criticized as being activist and interpreting treaty provisions beyond its

was necessary for the harmonization of laws in Europe and reflects the evolution of a legal system to meet the demands of economic integration.⁸³

The ECJ accomplished this task in the following ways: 1) it transformed an international treaty into a constitutional treaty by developing a body of precedent; 2) it created fundamental principles of EU law by interpreting the EU Treaties beyond their originally intended scope; and (3) it transferred power in three arenas: i) from the governments of the Member States to the institutions of the Community; ii) from the executive and the legislature to the judiciary; and iii) from higher national courts to lower national courts.⁸⁴

B. Transforming an International Treaty into a Constitutional Treaty

The ECJ transformed an international treaty into a constitutional treaty by creating precedent via Article 234's preliminary ruling system.⁸⁵

Successful constitutional courts turn constitutions into constitutional law, that is they convert a text enacted at a given historical moment into a continuous, collective stream of case law . . . in regard to the ECJ, the reference here is not to the much-proclaimed and much-disputed judicial conversion of the Treaties from the realm of international law to that of constitutional law, but to the building of a large body of ECJ law that has become self-generating.⁸⁶

judicial parameters."); Joseph R. Wetzels, Note, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, 71 *FORDHAM L. REV.* 2823, 2830 (2003) ("The ECJ's broad interpretations of treaty provisions, particularly EC Treaty Article 234, suggest the Court's willingness to assert itself on the supranational stage.").

83. See Shah, *supra* note 82 ("The ECJ has been at the forefront of the European integration movement and has deepened and expanded the original Community principals to maintain the effectiveness of EC law."); see also Wetzels, *supra* note 82, at 2831 (noting that "[t]he ECJ gradually has developed its power and influence with the aim of promoting uniformity in Community law, thereby contributing to further integration within the EC.").

84. See *infra* notes 84–178 and accompanying text.

85. See Helfer & Slaughter, *supra* note 53, at 292 (noting that "the ECJ's success has been such that it has been widely credited with transforming the Treaty of Rome from an international instrument into the 'constitution' of the European Community."); see also Sally J. Kenney, *The European Court of Justice Integrating Europe Through Law*, 81 *JUDICATURE* 250 (1998).

Since its creation in 1952 under the Treaty of Paris to hear cases for the Coal and Steel Community, the European Court of Justice has transformed itself from an international to a constitutional court, holding European Community law to be supreme and, in many cases, directly effective in member states.

Id.

86. See *EVOLUTION OF EU LAW*, *supra* note 31, at 326 ("The European Court of Justice's decisions have changed an international treaty into a constitution").

Instead of having an international instrument in which Member States would apply at their own discretion, the ECJ's interpretation of Article 234 secured the application and harmonization of community law.⁸⁷ According to one scholar, it is ironic "that Article 234 puts the ECJ in a weaker position than a supreme court in a federation," and yet, "the preliminary reference procedure has proved to be the main procedural route through which the process of the constitutionalization of the Community has taken place."⁸⁸

C. Integration by Adjudication

*"One of the most important developments in European law today is the emergence of a common private law within the European Community. . . . Yet, legal science has barely started to notice that the face of private law is about to be fundamentally reshaped."*⁸⁹

Through the preliminary ruling procedure under Article 234, the ECJ has developed a precedent based system achieving "integration by adjudication."⁹⁰ While no formal *stare decisis* system exists, "there is '[n]o doubt [that] a trend towards recognition of Community precedents is gaining momentum.'"⁹¹ As one scholar states:

The very prevalence of the European Court of Justice as a source, if not, as many would say today, as the most important source, of legal authority in the European Union, has created a system with an increasingly common-law-like component of *stare decisis*. European judges, like their common-law brethren, and, unlike their civil-law brethren (at least in the latter's official role), create law, fashioning it with each judicial decision, such that legal norms are judicially created for future application to similar future cases.⁹²

The development of Article 234 jurisprudence "can be seen as a historical record of legal integration."⁹³ The emphasis placed on ECJ preliminary rulings

87. *Id.*

88. Tridimas, *supra* note 7, at 128.

89. Zimmermann, *supra* note 6, at 104 (*emphasis added*).

90. Lindseth, *supra* note 13, at 664.

91. Swartz, *supra* note 11, at 694 (quoting D. Lasok & J.W. Bridge).

92. Curran, *supra* note 7, at 72.

93. Thomas de la Mare, *Article 177 in Social and Political Context*, in *THE EVOLUTION OF EU LAW* 215 (Paul Craig & Grianne de Burca eds., 1999). Preliminary rulings "allow Community law to acquire a determined meaning throughout the territory of the Community, and thus promote legal certainty and unity." *Id.* BERMANN, *supra* note 1, at 354.

"demonstrates [a] natural evolution in supranational law, even one based on civil law principles."⁹⁴

*Fashion Ribbon Co. v. Iberland S.L.*⁹⁵ represents an example of a national court citing an ECJ decision as precedent. In that case, the Supreme Tribunal of Spain cited the *Gubisch v. Palumbo*⁹⁶ decision when defining the concept of *lis pendens*.⁹⁷ The *Gubisch* decision occurred in 1987.⁹⁸ Sixteen years later, in a commercial dispute in Spain, the Supreme Tribunal of Spain cites *Gubisch* to define the legal concept of *lis pendens*.⁹⁹ The practice of national courts citing ECJ preliminary rulings exemplifies the development of precedent and harmonization of laws.

D. Building Blocks of the EU Legal System

Through the preliminary ruling system, the ECJ has expanded the scope of its jurisdiction and laid the foundation of EU law.¹⁰⁰ As former Judge Pescator of the ECJ notes: "[t]he decisions of the Court which have made the most

94. Charles, H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 52 (2003); see also Lindseth *supra* note 13, at 638. Commenting that:

In the three decades following the EEC's establishment in 1957, the Member States largely acquiesced in the Court's effort to elaborate autonomous supranational norms through the development of such fundamental doctrines as direct effect, supremacy, and implied powers, each of which helped to lay the legal foundation upon which subsequent political integration could build.

Id.

95. Tribunal Supremo, 1943/2001 (Madrid 2003) (a motion demanding exequatur of an arbitration award pursuant to the New York Convention) [hereinafter *Fashion Ribbon Co.*].

96. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861. In *Gubisch*, an Italian citizen was trying to enforce the validity of a contract against a German national. *Id.* *Gubisch* also filed a suit in a German national court stating that the contract was invalid. *Id.* Both the German and Italian court had different definitions of *lis pendens*, which determined whether the contract was enforceable or not. *Id.* The Italian court submitted to the ECJ a preliminary question on what the definition of *lis pendens* was under Article 21 of the Convention. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861. The ECJ recognized that "the concept of *lis pendens* is not the same in all the legal systems of the contracting states" and "a common concept of *lis pendens* cannot be arrived at by a combination of the various relevant provision of national law." *Id.* Instead of choosing between the Italian or German definition of *lis pendens*, the ECJ ruled that the definition of *lis pendens* from now on would be the ECJ's interpretation of Article 21 of the Brussels Convention. *Id.* (referring to the ECJ's definition of *lis pendens*). *Lis pendens* "covers a case where a party brings an action before a court in a contracting state for the recession or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another contracting state." *Id.*

97. *Id.*

98. Case 144/86, *Gubisch Maschinenfabrik KG*, 1987 E.C.R. 4861.

99. *Fashion Ribbon Co.*, 1943/2001.

100. White, *supra* note 34, at 848 ("The ECJ has used Article 177 to develop several unique concepts of EU law.").

conspicuous contribution to the development of Community law have been delivered [by the preliminary ruling].”¹⁰¹ The doctrine of direct effect, primacy of Community law over national law, protection of fundamental rights, and the principles of competition law and social law have all been developed by the preliminary ruling system.¹⁰² This analysis will focus on the doctrines of supremacy and direct effect, which are considered the “twin pillars of the Community’s legal system.”¹⁰³

1. Supremacy of EU Law

Unlike the Supremacy Clause of the United States Constitution, the European treaties contain no express rule that EU law is superior to national law in the areas in which the EU has competence.¹⁰⁴ However, if such a rule did not exist how could harmonization of laws occur if “in a case of conflict, domestic law was determinative”?¹⁰⁵ In *Costa*¹⁰⁶, “the ECJ handed down a landmark ruling which gave the laws of the EC supremacy over those of the Member States.”¹⁰⁷

In *Costa v. ENEL*,¹⁰⁸ an Italian Constitutional Court found an EC Treaty invalid because it conflicted with subsequent Italian legislation.¹⁰⁹ The legisla-

101. BERMANN, *supra* note 1, at 352; Lindseth, *supra* note 13, at 638.

102. BERMANN, *supra* note 1, at 352; Helfer & Slaughter, *supra* note 53, at 291–92.

103. Craig, *supra* note 31, at 560 (“[T]he reference procedure laid down in Article [234] must surely be the keystone in the edifice; without it the roof would collapse and the two pillars would be left as a desolate ruin, evocative of the temple at Cape Sounion – beautiful but not of much practical utility.”).

104. See BERMANN, *supra* note 1, at 269 (noting that “[t]he closest approximation is EC Treaty Article 10 (ex 5), which imposes on Member States a general obligation of loyalty to Community law . . .”); see also Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM. J. EUR. L. 229, 229–30 (1997). Commenting that:

The supremacy of Community law flows from the fact that the Community is a system of attributed or enumerated competencies. The Community has no inherent legislative or executive power; its institutions have no power to adopt an act unless they are authorized to do so by a Treaty provision. If no there is no legal basis for a legislative act in the EC Treaties, national law comes into. Thus, national law is superseded by secondary Community law only the latter is compatible with the EC Treaties—Community law not grounded in a Treaty provision is incapable of superseding national law.

Id. at 232.

105. Grimm, *supra* note 105.

106. Case 6/64, *Flaminio Costa v. Ente Nazionale per l’Energia Elettrica*, 1964 E.C.R. I–585.

107. Swartz, *supra* note 11, at 695.

108. Case 6/64, *Costa*, 1964 E.C.R. I–585.

109. See Swartz, *supra* note 11, at 695–96 (noting that “the Italian constitutional court found that as part of its domestic law, Italy had the power to create laws which contravened the Treaty of Rome.”).

tion permitted the Italian government to nationalize the electric company.¹¹⁰ According to Costa, an Italian citizen who refused to pay his electricity bill, nationalizing the electric company violated EC competition law.¹¹¹ The Italian Court reasoned that "because the Italian Legislature had created a law which conflicted with part of the Treaty of Rome, it was the Treaty rather than the later Italian law which had to give way."¹¹²

Relying on the wording of Article 189, the ECJ ruled that the EC's treaties were "directly applicable" to the Member States, and that the terms of the treaties were "binding in [their] entirety" on them.¹¹³ As the ECJ stated in its opinion, "[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . ."¹¹⁴ By invoking the spirit of the Treaty, the ECJ overruled a Member State's highest court and "established [early on] the supremacy of EC law over national law and guaranteed its own place as an important institutional wing of the EC."¹¹⁵

The new EU Constitution codifies the supremacy of EU law, a legal doctrine created purely by ECJ case law.¹¹⁶ Unlike civil law courts whose power is defined and constrained by a legal code, the ECJ developed legal principles to satisfy the demands of a supranational legal system.¹¹⁷ In this regard, the ECJ's behavior resembles a common law court and represents a significant example of the evolution of the European legal system to meet the demands of harmonization.¹¹⁸

110. Case 6/64, *Costa*, 1964 E.C.R. I-585.

111. *Id.*

112. Swartz, *supra* note 11, at 695-96.

113. *Id.*

114. BERMANN, *supra* note 1, at 270.

115. Swartz, *supra* note 11, at 695-96; *see also* Wetzel, *supra* note 82, at 2832 (discussing the evolution of the primacy principle in the *SpA Simmenthal v. Comm'n of the European Communities*, 1979 E.C.R. 777, case which ruled "that national courts must apply Community law in its entirety and eliminate any national laws that conflict with Community law.").

116. Roger J. Goebel, *European Union Law: Overview: The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 *FORDHAM INT'L L.J.* 455, 496 (2004).

117. *Id.*

118. *Id.*

2. Doctrine of Direct Effect—Giving Private Litigants a Voice

The second pillar of the EU legal system is the doctrine of direct effect.¹¹⁹ In its essence, the doctrine of direct effect allows Community regulations to be self-executing, thus, creating rights for individuals in Member States without the passage of legislation typically required to enforce rights under a Treaty.¹²⁰ The doctrine of direct effect declares that “there are certain Treaty provisions that 1) are precise enough to be directly effective, 2) are unqualified, and 3) require no discretion in their application by the court.”¹²¹ Any national law which conflicts with any of these Treaty provisions must be set aside by Member States.¹²² The Treaty provisions that are “sufficiently precise and unconditional so as to confer legal rights upon that individual”¹²³ also have direct effect on Member States and are enforceable by individuals in their national courts.¹²⁴

In addition, the ECJ has ruled via Article 234 that if a Member State fails to implement a directive after the allotted time period, the directive is still directly applicable.¹²⁵ The court articulated that these “directives have direct effects in national courts in the sense that they can be relied upon against the state or state bodies . . . irrespective of whether the directive has been implemented.”¹²⁶ This ruling in effect gave private citizens judicially enforceable rights under EU law.

Perhaps the greatest transfer of power via the ECJ’s interpretation of Article 234 was the doctrine of direct effect, which granted individuals and corporations the right to enforce EU law in their national courts.¹²⁷ “As in the

119. See CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 258 (discussing the *Van Gend en Loos* decision which initiated the doctrine of direct effect).

120. See EVOLUTION OF EU LAW, *supra* note 31, at 330 (declaring that “[t]he Court’s great bootstrapping operation was, of course, its case law creating ‘direct effect’ so that the Treaties and the secondary laws made under them came to have the kind of ‘supremacy’ that occurs in federal, constitutional states rather than in international organization operating under international law”); see also BERMANN, *supra* note 1, at 271 (stating that Article 249 is the legal basis of direct effect).

121. Case 283/81, *Srl CILFIT & Lannificio di Gavardo SpA*, 1982 E.C.R. 3415. (noting that “[i]n order to find liability, the court must determine that 1) the directive in question provides individuals with rights, 2) these rights are identifiable in the directive itself, and 3) a causal link exists between the state’s breach and the individual injuries.”). See also White, *supra* note 34, at 850.

122. White, *supra* note 34, at 848.

123. Breyer, *supra* note 14, at 1050.

124. White, *supra* note 34, at 848.

125. *Id.*

126. *Id.* (quoting John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 FORDHAM INT’L L.J. 1, 4 (1992/1993)).

127. See Karen J. Alter, *Who are the “Masters of the Treaty?”: European Governments and the European Court of Justice*, 52 INT’L ORG. 121, 126 (1998) [Hereinafter Alter I] (noting that by “using the

United States, individuals are the 'principal 'guardians' of the legal integrity of Community law,' through the Article 234 preliminary ruling procedure."¹²⁸ This right not only enhanced the validity of the EU as a recognizable international institution, but it gave individuals a democratic voice in a system that leaves little room for individual say.¹²⁹

As the ultimate recipients of the benefits of a common legal system, the ECJ gained a potent ally in the harmonization of laws by empowering private litigants.¹³⁰

From the earliest of days of the Community, individuals have been drawn in to the process of making the common market a reality in their own States when the Court of Justice (quietly) developed fundamental principles of direct effect and supremacy of Community law. In this way the Court has created an alliance between itself and individuals, thereby circumventing the Member States and the Community legislator.¹³¹

direct effect and supremacy of EC law as its legal crutches, the ECJ does not itself exceed its authority by reviewing the compatibility of national law with EU law in preliminary ruling cases."); *see also* Tridimas, *supra* note 7, at 128 (stating that the combination of "the mechanism of preliminary references with the doctrines of primacy and direct effect enables individuals and companies to assert Community rights in national courts").

128. Maazel, *supra* note 82, at 19 (citing J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2414 (1991)).

129. *See* Wetzel, *supra* note 82, at 2834. Stating that:

Through its judgments in response to preliminary reference requests, the ECJ has enhanced individual rights in areas where Community law affords better protection than the national law of some Member States, such as equal pay for women. By subjecting Member States' actions that affect fundamental rights to judicial review under EU standards, Article 234 has become a vital tool for fundamental rights improvement.

Id. *See generally* Lindseth, *supra* note 13, at 633-35 (describing the "Democratic Deficit" that is inherent in national and supranational institutions); *see also* Breyer, *supra* note 14, at 1053 (commenting that many European believe the EU suffers from a "democratic deficit").

130. *See* Wetzel, *supra* note 82, at 2834 (discussing "[t]he social legitimacy resulting from the Court's image as a valuable ally to the individual against the Member State's national governments substantially enhances the ECJ's ability to promote fundamental rights within the European Union."); *see also* Tridimas, *supra* note 7, at 128 (noting that "individuals may use Community law as a 'shield', i.e. to defend themselves from action by the national authorities which infringes Community rights, and as a 'sword', i.e. to challenge national measures on grounds of incompatibility with Community laws."). Allowing private litigants a voice is something that is not permitted by all free movement treaties, as evidenced by Article 2022 of North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 699.

131. BERNARD, *supra* note 6, at 17.

Individual litigants with "an economic stake" in the formation of a common market were "the primary source of demand for law rulings."¹³²

Allowing private litigants to raise claims in national courts regarding EU law permitted the ECJ to address Member States' infringement, enlarging the scope of the ECJ's power and undermining Member States' sovereignty.¹³³ "[T]he preliminary reference procedure provides an opportunity for individuals and, indeed, national courts to question governmental action. The ability of a national government to control which cases are sent to the ECJ is thus undermined."¹³⁴ Instead of relying on Member States or the Commission to be the enforcers of EU law, individuals and companies with an economic interest in integration allowed the ECJ to address a wide breadth of legal issues pertaining to the goal of economic harmonization.¹³⁵ "In this manner, the system of preliminary ruling has been transformed into a mechanism of enforcing EC law and implementing legal integration."¹³⁶

*Francovich v. Italy*¹³⁷ established the principle giving private litigants the power to raise claims against a national government for failing to implement a directive that granted individual rights under EU law.¹³⁸ It was not uncommon for governments to resist implementation of an EU directive by either not transposing the directive on time, executing it incorrectly, or not implementing it at all.¹³⁹ Through the *Francovich* decision, the ECJ demonstrated "the urgent

132. Tridimas, *supra* note 7, at 142.

133. Alter I, *supra* note 127, at 127 ("The transformation of the preliminary ruling system significantly undermined [M]ember [S]tates' ability to control the ECJ. It allowed individuals to raise cases in national courts that were then referred to the ECJ, undermining national governments ability to control which cases made it to the ECJ.").

134. Tridimas, *supra* note 7, at 128. "[O]ffering individuals and companies the possibility of challenging national law increases the ability of the ECJ to pursue its most preferred policies, while it simultaneously decreases its dependence on the governments of the member states and the Commission to raise an infringement cases." *Id.* at 137.

135. *See id.* at 128 (stating that "[a]reas of policy that were thought to be under the exclusive remit of the Member States can now be considered, and indeed influenced, by the ECJ, bringing about a distinct loss of national sovereignty.").

136. Tridimas, *supra* note 7, at 128; *see also* Alter I, *supra* note 127, at 129. Noting that: Although the Court likes to pose modestly as "guardian of the Treaties" it is in fact an uncontrolled authority generating law directly applicable in Common Market member states and applying not only to EEC enterprises but also to those established outside the Community, as long as they have business interests within it.

Id.

137. Cases C-6/90, 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357.

138. *Id.*

139. Melanie L. Ogren, *Francovich v. Italian Republic: Should Member States be directly liable for nonimplementation of European Union Directives?*, 7 TRANSNAT'L LAW. 583, 604-05 (1994) (noting that "although [M]ember [S]tates may have accepted the rule of law of the EEC Treaty and the holding of *SpA*

need for enforcement and implementation of EU directives by [M]ember [S]tates.”¹⁴⁰

In *Francovich*, the Italian State failed to implement a directive on the protection of employees in the event of the employer's insolvency.¹⁴¹ Member States were directed to set up a fund for compensating workers affected.¹⁴² Plaintiff's employers went bankrupt, leaving plaintiff with no remedy.¹⁴³ The Italian courts requested a preliminary ruling on the issue.¹⁴⁴ In response, the ECJ ruled “that governments must compensate individuals for the loss caused to them resulting from the nonimplementation of directives, even those without direct effect.”¹⁴⁵ Thus, the ECJ laid down the general principle that Member States are liable for the consequences of not implementing directives which create individual rights.¹⁴⁶

The underpinning rationale of the *Francovich* decision is that by failing to enforce individual rights recognized under EU law, EU law will be undermined.¹⁴⁷ “In order to meet the goals outlined in the EEC treaty, directive compliance must be enforced if the system of the European Union that has been created by its members is to reach its true potential.”¹⁴⁸ The European Union was created by Member States to derive the benefits of economic and political harmonization.¹⁴⁹ Signatories to the EEC Treaty must recognize that they chose

Simmenthal [1979 E.C.R. 777] in practice [M]ember [S]tates fail to adhere to those rules.”).

140. Ogren, *supra* note 139, at 604.

141. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357; see also Christoph U. Schmid, *Pattern of Legislative and Adjudicative Integration of Private Law*, 8 COLUM. J. EUR. L. 415, 461 (2002) (discussing the *Francovich* case).

142. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357.

143. *Id.*

144. *Id.*

145. Garret, *supra* note 7, at 168–69.

146. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357; see also White, *supra* note 34, at 850.

Stating that:

In deciding whether the employees should be compensated, the ECJ noted that the EEC Treaty, now the EC Treaty, ‘created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States, but also their nationals.’ Thus, the Treaty and community law impose obligations on individuals, member nations, and community institutions.

Id.

147. Cases C-6/90, 9/90, *Francovich*, 1991 E.C.R. I-5357. “The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.”. *Id.*

148. Ogren, *supra* note 139.

149. THE EUROPEAN UNION AT A GLANCE, at http://www.europa.eu.int/abc/index_en.htm (last visited

to surrender some of their sovereignty to derive these benefits.¹⁵⁰ “This recognition implies an empowerment of the European Court of Justice in the enforcement of the goals of the European Union.”¹⁵¹

E. Expanding the Scope of its Jurisdiction

The key to the ECJ’s increase in jurisdiction has been through treaty amendments and an expansive reading of the EU Treaties.¹⁵² The ECJ handles cases on issues of the environment, direct taxation, public policy, arbitration, and fundamental human rights, to name a few.¹⁵³ With more matters coming under the ECJ’s jurisdiction, its power to harmonize law is increasing. As United States Supreme Court Justice Breyer states in reference to the preliminary ruling system, “one might believe, or at least plausibly argue, that EC law, as interpreted by the ECJ, slowly but surely will come to dominate national law in many areas of European life.”¹⁵⁴

A prime example of the ECJ extending its jurisdiction is the *Eco Swiss China Ltd. v. Benetton International NV* decision which defined the notion of public policy and redefined procedures for making an arbitration agreement enforceable.¹⁵⁵ In *Eco Swiss*, the ECJ ruled that certain types of arbitration

Feb. 13, 2005) (“[The EU] has helped to raise living standards, built a single Europe-wide market, launched the single European currency, the euro, and strengthened Europe’s voice in the world.”).

150. *Id.*; see Ogren, *supra* note 139 (discussing the benefits of belonging to the EU).

151. Ogren, *supra* note 139. “Without directive compliance, the EU essentially loses its gamut of control, and unification and harmonization between member states become meaningless ideals. *Francovich v. Italian Republic* is an attempt by the European Court of Justice to urge compliance with EU [d]irectives.”. *Id.* at 605.

152. See BERMANN, *supra* note 1, at 63–65 (discussing Treaty of Nice giving the ECJ the right to rule on issues of fundamental rights).

153. Interview with Isabel Fernández de la Cuesta, *supra* note 45.

154. Breyer, *supra* note 14, at 1051; see also Zimmermann, *supra* note 6, at 104 (stating “[t]he process of harmonization and unification of private law on a European level appears to be irreversible today; and it is likely to gain an ever greater momentum.”). The implications for international companies, especially US corporations doing business with European countries, is an increasing demand for lawyers who understand EU law and are familiar with the ECJ rulings; see also BERMANN, *supra* note 1, at 3. (“As those engaged in international transactions take increasing interest in the development of Europe-wide policies, so the international legal community has taken a parallel interest in the workings of the relatively young but sophisticated Community legal system.”).

155. Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int’l NV*, 1999 E.C.R. I-03055.

agreements are void against public policy.¹⁵⁶ Accordingly, if any one of the four freedoms is hampered, the agreement is void against public policy.¹⁵⁷

Before *Eco Swiss*, various definitions of public policy existed in Europe.¹⁵⁸ Each nation had a distinct definition written into their civil code.¹⁵⁹ With the *Eco Swiss* decision, the ECJ ruled that Member States could still have their definitions of public policy, but in order to comply with EU law their definition must at a minimum abide by the ECJ's definition of public policy.¹⁶⁰

The *Eco Swiss* decision demonstrates the ECJ's goal of the uniform application of EU law, by requiring parties to an arbitration agreement to meet the ECJ's definition of public policy.¹⁶¹ The implication of this decision is that when parties are drafting arbitration agreements, they will look primarily to ECJ jurisprudence, not the New York Convention, if they want their arbitration agreement to stand in a European court.¹⁶²

F. Garnering the Support of National Courts

The preliminary ruling system is dependent on national courts cooperating by submitting questions of EU law to the ECJ.¹⁶³ The preliminary ruling

156. See *id.*; see also Christoph Liebscher, *Arbitral & Judicial Decision: European Public Policy After Eco Swiss*, 10 AM. REV. INT'L ARB. 81, 83 (1999) (explaining that Benetton submitted a petition to the national court asking it to annul the arbitration award on the grounds that the arbitration agreement violated Article 85 (now article 81) since it contained a market-sharing clause.). Case C-126/97, *Eco Swiss China Time Ltd.*, 1999 E.C.R. I-03055. Susana S. Ha, *The effects of Nullity of Article 81(2) EC*, LUND U.: MASTER OF EUROPEAN AFFAIRS PROGRAMME LAW, 16 (2003). "Article 81(1) and 82 [of EC Treaty] establish, in general terms, a prohibition of practices which may distort trade between Member States" *Id.* at 4. If an agreement violates Article 81, it is considered void under Article 82. *Id.*

157. Liebscher, *supra* note 156, at 83 (quoting the ECJ: "[a]rticle 81 constitutes a fundamental provision which is essential for the tasks of the Community, and, in particular, for the functioning of the internal market . . . [A]ny agreements or decisions prohibited pursuant to that article are to be automatically void.").

158. Interview with Anibal Sabater, Foreign Legal Consultant, Fulbright & Jaworski L.L.P., in Houston, Tex. (Jan. 8, 2005) (on file with author) [hereinafter Interview with Anibal Sabater].

159. *Id.*

160. See Ha, *supra* note 156, at 13 (quoting the ECJ's holding "that Article 81 EC constitutes 'a fundamental provision which is essential for the accomplishment for the functioning of the internal market' and is to be considered 'a matter of public policy.'").

161. See *id.* "The ECJ reiterates that it is manifestly in the interest of the Community legal order that the rules of Community law are given a uniform interpretation, irrespective of the circumstances in which they are to be applied." *Id.* See also Ha, *supra* note 156, at 14 (noting that in this ruling, the ECJ "recognized the importance of Article 81 EC in the accomplishment of the internal market.").

162. Interview with Anibal Sabater, *supra* note 158 (The New York Convention is the main treaty on the enforceability of arbitral awards).

163. See Tridimas, *supra* note 7, at 142.

procedure begins and ends with national courts.¹⁶⁴ Without their support, the ECJ's power under Article 234 could not have been established.¹⁶⁵ By national courts submitting questions to the ECJ and then applying the ECJ's interpretation of EU law, EU law becomes "nationalised."¹⁶⁶

Consequently, the acceptance of preliminary rulings as precedent by national courts "has [had important] implications for the more general relationship between national courts and the ECJ."¹⁶⁷ As noted by some scholars:

In so far as ECJ rulings do have precedential value, they place the Court in a superior position to national courts. The very existence of a system of precedent is indicative of a shift to a vertical hierarchy between the ECJ and national courts: the ECJ will lay down the legally authoritative interpretation, which will then be adopted by national courts.¹⁶⁸

The transfer of power from national courts to the ECJ in essence created a hierarchy with the ECJ at the top of that system.¹⁶⁹ While national courts, especially the Supreme Courts, could have felt threatened by this transfer of power (and many in fact were),¹⁷⁰ the empowerment of the ECJ served to empower the judiciary of many Member States.¹⁷¹

The ECJ transferred power from the executive and legislative branches to the judiciary by making "national courts . . . [the] enforcers of Community law in their own right."¹⁷² "When the ECJ has decided an issue, national courts can then apply the ruling without further resort to the ECJ. The national courts are, in this sense, 'enrolled' as part of a network of courts adjudicating on

164. Craig, *supra* note 31, at 560; *see also* Shifrin, *supra* note 54. "Disputes involving Community law never come directly before the Court of Justice, but rather before the courts and tribunals of Member States." *Id.*; Tridimas, *supra* note 7, at 142 (stating that "demand becomes effective only when national courts refer to the ECJ, which is the ultimate source of supply [of preliminary references]").

165. *See* Tridimas, *supra* note 7, at 134 (explaining that "In short, the co-cooperation of national courts is a *sine qua non* for the success of the preliminary reference procedure Legal integration and the implementation of ECJ jurisprudence has relied on the willingness of national courts to refer cases to the Court.") (emphasis added).

166. Craig, *supra* note 31, at 560.

167. CRAIG & DE BURCA, EU LAW, *supra* note 57, at 442.

168. *Id.*

169. *Id.* at 450 (stating that "the ECJ [is] at the apex of that network").

170. *See infra* notes 175–180 and accompanying text (discussing the empowerment of lower national courts by Article 234).

171. *See generally* Karen J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe 34 (2001) [Hereinafter Alter II].

172. CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450.

Community law . . .¹⁷³ Politicians who attempt to use extra legal means to circumvent ECJ law are faced by national courts applying ECJ rulings.¹⁷⁴ Thus, by reinforcing their own legitimacy, national courts bolstered the ECJ's legitimacy. This system of precedent also serves as an "important symbolic [function] which flows from the recognition that the national courts are part of a real Community judicial hierarchy."¹⁷⁵

While the cooperation of national judiciaries was necessary for expanding the ECJ's preliminary ruling power, it was the enlistment of lower national courts that solidified the ECJ's prominence. Because lower national courts are permitted to make preliminary references under Article 234,¹⁷⁶ lower courts could bypass their country's Supreme Court and thereby influence policy issues at the highest level.¹⁷⁷ This is described as "judicial empowerment."¹⁷⁸ The rationale behind this theory is:

In a national setting without access to the supranational legal system, the national court has few, if any chances, to see its ideal point implemented, since the higher national authority will reverse it on appeal or by new national legislation. When the national court is given the option to refer the case to the ECJ and apply its ruling, the set of interpretations that can be applied in practice changes dramatically.¹⁷⁹

173. *Id.*

174. *Alter I, supra* note 127, at 133; *see also* EVOLUTION OF EU LAW, *supra* note 31, at 144-45 (stating that the support of national judiciaries "was critical in limiting the ability of national governments to simply ignore unwanted legal decisions from the international ECJ" . . . and reiterating that "the ECJ has changed the weak foundations of the EU legal system, with the help of national judiciaries").

175. CRAIG & DE BURCA, EU LAW, *supra* note 57, at 450.

176. *See supra* notes 33-40 and accompanying text (discussing the institutions and circumstances which permit submission of preliminary questions to the ECJ).

177. *Tridimas, supra* note 7, at 135.

178. *Id.* (citing J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991)).

179. *Tridimas, supra* note 7, at 141-43 noting that:

The ability of national courts to influence policy is much weaker in the national context of each [M]ember [S]tate than in the supranational context of the EC, where national courts implement the authoritative interpretations of the law given by the ECJ. The rulings of national courts can be overturned and altered more easily by higher national authorities than the rulings of the ECJ can be altered by the equivalent authorities of the EC.

Id. Accord Weiler, *supra* note 128, at 2426 (stating that "Lower courts and their judges were given the facility to engage with the highest jurisdiction in the Community and thus have de facto judicial review of legislation.").

Article 234 served to empower lower national courts, securing the cooperation of national courts in the application and "the very development of the Community legal order."¹⁸⁰

V. MEMBER STATES REACTION

A. Background

"It is fair to say that when the Member States opted for an ECJ, they thought that Luxembourg would be far closer to the Hague than the District of Columbia."¹⁸¹ Historically, the ECJ was created to deal only with the review of EU law, not the interpretation of national laws.¹⁸² Member States intended to create a court with limited jurisdiction to protect their national sovereignty.¹⁸³ However, through Article 234 the ECJ "transformed the preliminary ruling system from a mechanism to allow individuals to question *EC law* into a mechanism to allow individuals to question *national law*."¹⁸⁴ As one scholar states, "[t]he accretion of power by the European Court of Justice is arguably the clearest manifestation of the transfer of sovereignty from nation-states to a supranational institution, not only in the European Union but also in modern international politics more generally."¹⁸⁵ Despite this dramatic shift in power, Member States and their national courts "have bowed to the ECJ's requirements, and have accepted the Court's jurisprudence."¹⁸⁶

How is it then that Member States, which created the ECJ, allowed the Court to expand its jurisdiction beyond its originally intended reach?¹⁸⁷ As

180. Tridimas, *supra* note 7, at 134.

181. EVOLUTION OF EU LAW, *supra* note 31, at 331 (emphasis added).

182. Alter I, *supra* note 127, at 125 (stating "Article 177 challenges were to pertain only to questions of European law, not to the interpretation of national law or to the compatibility of national law with EC law."). See *id.* also noting:

The ECJ was created to fill three limited roles for the [M]ember [S]tates: ensuring that the Commission and the Council of Ministers did not exceed their authority, filling in vague aspects of EC laws through dispute resolution, and deciding on charges of noncompliance raised by the Commission or by member states. None of these roles required national courts to funnel individual challenges to national policy to the ECJ or to enforce EC law against their governments. Indeed, negotiators envisioned a limited role for national courts in the EU legal system.

Id. at 124.

183. *Id.* at 122.

184. *Id.* at 126; see also Tridimas, *supra* note 7, at 137 (noting that the transformation of "the preliminary ruling system into a mechanism for the enforcement of EC law has conferred considerable autonomy to the ECJ and freed it from being subservient to the national governments that set it up.").

185. Garret, *supra* note 7.

186. Wetzel, *supra* note 82, at 2833.

187. Alter I, *supra* note 127, at 122.

discussed earlier, the enlistment of national courts, especially lower courts, greatly assisted in the expansion of the ECJ's jurisdiction.¹⁸⁸ In addition to their cooperation, various other factors influenced the acceptance of ECJ precedent without arousing the suspicion and retaliation of Member States.¹⁸⁹ These factors include: 1) low profile decisions by the ECJ; 2) different timelines for politicians and judges; 3) the difficulty of changing or amending the EC Treaty; and 4) denying an ECJ ruling is like denying membership to the EU.¹⁹⁰ While this list is not exhaustive, it demonstrates some of the more important reasons behind Member States accepting the ECJ's expansion of jurisprudence.¹⁹¹

B. Low Profile Decisions

Some theorists speculate that "by limiting the material impact of its decisions, the ECJ could minimize political focus on the Court and build doctrine without provoking a political response, creating the opportunity for it to escape [M]ember [S]tate oversight."¹⁹² Much like the judicial tactic used by Justice Marshall in *Marbury v. Madison*,¹⁹³ the ECJ built powerful legal doctrines by introducing the concept but not wielding its power.¹⁹⁴ As

188. See *supra* notes 162–180 and accompanying text (discussing the cooperation of national courts in referring preliminary questions to the ECJ and applying their decisions as precedent); see also *id.* at 122 (discussing that with national courts sending cases to the ECJ and applying ECJ jurisprudence, interpretative disputes were not easily kept out of the legal realm, and that national courts would not let politicians ignore or cast aside as invalid unwanted decisions).

189. See generally *Alter I*, *supra* note 127, at 129–35 (discussing how the ECJ escaped Members States' control).

190. See *infra* notes 200–205 and accompanying text.

191. See generally *Tridimas*, *supra* note 7, at 137–38 (discussing the principle agent relationship as another factor in how the ECJ grew powerful without Member States noticing).

Borrowing from the economic theory of the principle-agent relation the ECJ is seen as an institution (agent) to which sovereign states (principals) have delegated authority to interpret the law and thus facilitate transnational co-operation between the member states. However, given the powers granted to accomplish its functions, the institution may take a life of its own and serve its own interests by pursuing its most preferred policies rather than those of the principals. In practice this takes the form of advancing pro-integration policies that would not have been favored by some of the member state governments.

Id.

192. *Id.* at 133. See also *Garret*, *supra* note 7, at 155 (stating that "[t]he best way for the Court to further this agenda is through the gradual extension of case law (that is, the replacement of national laws and practices by ECJ decisions as the law of the land in EU member states)."). *Id.*

193. 5 U.S. 137 (1803).

194. See *Alter I*, *supra* note 127, at 131 relating that:

A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it

demonstrated in the *Da Costa* decision, "the ECJ declared the supremacy of EC law . . . , but it found that Italian law privatizing the electric company did not violate EC law."¹⁹⁵ By laying the foundation of the EC legal system in an incremental fashion, the ECJ was able to develop a foundation which challenged the sovereignty of Member States, but did not arouse their suspicion until it was too late.¹⁹⁶

C. Different Time Lines for Politicians and Judges

The different time horizons for political and judicial careers also greatly affected the Court's ability to cultivate legal principles.¹⁹⁷ Because the political system is subject to a much shorter time frame, the national judiciaries are less politically vulnerable.¹⁹⁸ "By making sure that ECJ decisions did not compromise short-term political interests, the judges and the Commission could build a legal edifice without serious political challenges."¹⁹⁹ The material impact of ECJ decisions mattered more to politicians than their doctrinal significance.²⁰⁰

D. To Deny an ECJ Decision is Like Denying Membership to the EU

In relation to the other EU institutions, the ECJ is considered perhaps the most popular of the four institutions.²⁰¹ As a neutral third party enforcing the

is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.

Id. (citing TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY* 78-79 (2nd ed. 1988)).

195. *Alter I*, *supra* note 126, at 131 (citing *Tridimas*, *supra* note 7).

196. *See* Lindseth, *supra* note 13, at 664 noting that:

Integration by adjudication was effective in part because it appealed to rule of law sentiments among Member States officials, even where they were otherwise hostile to specific decisions. It gave integration a distinctly incremental feel, not necessarily a bad thing while the new regulatory regime was trying to legitimate itself.

Id.

197. *Alter I*, *supra* note 127, at 142-43.

198. *Id.*

199. *Id.* at 131.

200. *See id.* at 143 (stating that by taking advantage of the political fixation on the material consequences of cases the ECJ was able to construct legal precedent without arousing political concern).

201. Interview with Anibal Sabater, *supra* note 158 ("If you have a conversation on the street with Europeans about the EU, most will speak highly of the European Court of Justice. This is because the ECJ, unlike the other Community institutions, represents a neutral third party willing to adjudicate interests on behalf of individuals.").

rights of private citizens created under the EC treaties, the ECJ is perceived as an unbiased enforcer of justice.²⁰² “No member has ever flatly rejected a Court ruling: to do so would be tantamount to denial of membership of the EC.”²⁰³ In addition, Member States who flout the authority of the ECJ face political repercussions.²⁰⁴ Member States who do not abide by an ECJ ruling are “single[d] out,” perceived as “uncooperative,” and are forced to face their “domestic courts which apply the ECJ rulings.”²⁰⁵

E. Difficulty in Reversing or Curtailing the ECJ's Power

After Member States realized the omnipotence of the ECJ's jurisdiction under Article 234, it was too late to curtail its power. Overturning an ECJ decision is very difficult.²⁰⁶ It requires not only the passage of new legislation, but cooperation among Member States.²⁰⁷ “[C]hanging the constitutional provision or changing the role and the functions of the Court requires treaty revision,” something which can only be accomplished “by unanimity and ratification by each [M]ember [S]tate.”²⁰⁸ The challenge of achieving unanimity in overturning or revising an ECJ decision or power makes such action impractical.

VI. CONCLUSION

With the signing of the EU Constitution in October of 2004,²⁰⁹ the EU is moving towards the recognition of a supranational institution. The evolution of the European Union requires the evolution of its legal system. Inherent to the success of this process has been the ECJ's development of precedent through the preliminary ruling system under Article 234.²¹⁰

202. *Id.*

203. Swartz, *supra* note 11, at 694 (quoting Colchester & Buchan).

204. Tridimas, *supra* note 7, at 138.

205. *Id.*

206. *See id.* *See also* Alter I, *supra* note 127, at 135 (stating that “[t]he only choice left for politicians is to rewrite the EU legislation itself.”).

207. *See* Tridimas, *supra* note 7, at 138.

208. *Id.* (noting that “[t]he latter implies that the threat of revising the Court's mandate may lack credibility and diminish its value”); *see also* Alter I, *supra* note 127, at 136. “In order to change the treaty, [M]ember [S]tates need unanimous agreement plus ratification of the changed by all national parliaments. Obtaining unanimous agreement about a new policy is hard enough. But creating a unanimous consensus to change an existing policy is even more difficult.” *Id.*

209. *EU leaders sign new constitution*, BBC NEWS, Oct. 29 2004, <http://news.bbc.co.uk/1/hi/world/europe/3963701.stm> (last visited Oct. 6, 2005).

210. *See supra* notes 55–80 and accompanying text (giving an overview of the ECJ's development of a precedent based system).

By engaging the support of national courts, private litigants, and creating a body of case law, the ECJ propelled the EU's mission of economic harmonization forward.²¹¹ With the duty to harmonize the laws of twenty-five different nations, "the legitimization of precedent can . . . be defended on the ground that there was not, in reality, any other choice for the ECJ."²¹²

The ECJ's development of precedent represents the natural evolution of the global legal system.²¹³ As argued by one scholar, "the first steps toward a global legal culture will be dominated by some blending of civil law and common law."²¹⁴ It is quite possible that the ECJ's development of precedent through Article 234 represents "the tentative emergence of a common private law for the European Community."²¹⁵

211. Lindseth, *supra* note 13, at 663.

212. CRAIG & DE BURCA, *EU LAW*, *supra* note 57, at 450.

213. See Miriam Aziz, *Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment*, 9 COLUM. J. EUR. L. 109, 110 (2002) (stating that "the project of European integration and sovereignty . . . at the micro-level represents an illustration of the effects of the macro-level of globalization.").

214. Koch, *supra* note 94, at 3.

215. Zimmermann, *supra* note 6, at 72.

CLOSING THE GAPS IN UNITED STATES LAW AND IMPLEMENTING THE ROME STATUTE: A COMPARATIVE APPROACH

*Michael P. Hatchell**

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I. THE COMPARATIVE APPROACH

A. Introduction

This paper provides a comparative framework to analyze the extent to which five major democracies Canada, United Kingdom, Australia, Germany, and France—incorporated the subject matter jurisdiction Articles of the Rome Statute of the International Criminal Court (“Rome Statute”) through their domestic legislative processes while ratifying the Rome Statute, and what, if anything, the United States can interpret from the five distinct approaches. By examining what deviations the states made from the wording in the Rome Statute, how variant the deviations are, and what the rationale for such variations are, a picture will emerge which could provide guidance to the United States, were it to aspire to incorporate the Rome Statute crimes into the federal criminal code, amend Title 18 of the United States Code, and thus assure United States primacy over the International Criminal Court (“ICC”) complementarity jurisdiction. Through the use of comparative analysis, it is plausible to reason whether it would be feasible for the United States to build off the examples, close the gaps in the United States Code,¹ and ultimately ratify the Rome Statute. There appears to be a balancing act inherent in the ratification of the Rome Statute.² On one hand, there is the Rome Statute itself which details the requirements for incorporation into the ICC regime, the meaning and purpose of which must be included in the domestic code of the ratifying states in order to obtain jurisdiction over the ICC crimes.³ While, at the same time, there are political and legal considerations all of which require the governments to modify the wording of the Rome Statute’s Articles to conform to the states’ individual circumstances.⁴ However, too great a deviation from the meaning

1. See Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001) (discussing the gaps in the federal criminal code as they pertain to federal jurisdiction over Genocide, Crimes Against Humanity, and War Crimes).

2. See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute]; see also Jennifer Schense & Donald K. Piragoff, *Commonalities and Differences in the Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 245 (Matthias Neuner ed., 2003) (discussing the differences of each state’s approach depending on unique legal, constitutional and due process criteria).

3. Rome Statute, *supra* note 2, arts. 5–8 (covering the crimes of “Genocide,” “War Crimes,” and “Crimes Against Humanity”).

4. *Id.* The Rome Statute is therefore somewhat analogous to a model treaty in that the Articles do not have to be incorporated verbatim into the domestic legal code of the ratifying state. The practical impossibility of the exercise, due to the vastness of criminal codes worldwide, requires that some flexibility be expected. The interesting question is how much flexibility will be allowed before the domestic statute falls outside the meaning and purpose of the Rome Statute. It should prove very interesting to observe how the

and purpose of the Rome Statute's Articles could produce a situation whereby the applicability of the treaty would be called into question. The balancing act between the intended purpose and meaning of the Rome Statute and the unique domestic requirements could presumably be too great for some countries, and subsequent ICC and domestic court decisions will analyze these instances as they arise and the ICC jurisprudence matures. It would be reasonable to assume that the ICC would take the unique circumstances of each country into consideration when called upon to interpret the implementing legislation, in essence, passing judgment over whether the state in question has the legal capability to genuinely carry out an investigation or prosecution pursuant to Articles 17 and 18 of the Rome Statute.

The international community assembled through the auspices of the United Nations in December of 1989⁵ to voice its concern about worldwide impunity for *hostis humani generis*,⁶ and began to conceptualize a permanent judicial organ focused on the most heinous crimes that exist.⁷ Instead of fashioning *ad hoc* tribunals for different instances of grave crimes that focus on specific regions or conflicts, as was done in Rwanda, the Balkans, the Special Court for Sierra Leone, or even a hybrid court, and as we are currently witnessing in

young court handles the instances where certain countries have strayed too far outside the boundaries of the Rome Statute. This scenario gives rise to many complex questions beginning with whether the state actually ratified the treaty.

5. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, 340–44 (2003); see also KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 13 (2000).

6. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

7. Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law*, in *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT* 43 (Dinah Shelton ed., 2000); see M. Cherif Bassiouni, *The International Criminal Court In Historical Context*, 99 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55; The preamble of the Rome Statute states:

Recognizing that such grave crimes threaten the peace, security, and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. . . .

. . . .
Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole. . . .

Rome Statute, *supra* note 2, pmbl.

Cambodia, a more permanent solution was conceived, one which ultimately became the constitutive agreement for the ICC known as the Rome Statute.⁸

In June and July of 1998, plenipotentiaries from around the globe met in Rome for five weeks with the single purpose of formulating a multilateral agreement that would end impunity for the perpetrators of the most heinous crimes, bringing the hope of justice to those who suffered and those who continue to suffer, from the most wretched acts of humankind.⁹ To make the multilateral treaty-drafting exercise even more difficult, it was ultimately decided that no reservations were allowed to be lodged.¹⁰ The disparate ideologies that many states have had in the past to multilateral agreements were generally quelled by their ability to register their disagreements with reservations which are included in the treaty document. The Rome Statute was to be different, however, and debates occurred regarding a state's ability to lodge formal reservations,¹¹ as is permitted by the Vienna Convention on the Law of Treaties.¹² In the end, the states were left with lodging merely understandings.¹³ The Rome Statute entered into force on July 1, 2002, with the

8. Rome Statute, *supra* note 2, pmbl.

9. Bassiouni, *supra* note 7, at 55.

10. David J. Scheffer et al., *Panel: The Foreign Affairs Consequences of America's Absence*, 8 UCLA J. INT'L L. & FOREIGN AFF. 17, 39 (2003) (stating that "one of our great defeats in Rome, was the fact that we failed to get a reservations clause into the treaty."); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL L. REV. 47, 84 (2002) (stating "[T]he United States opposed such a prohibition prior to and during the Rome Conference."); *see also* Rome Statute, *supra* note 2, art. 120 (stating plainly that no reservations are to be allowed; similar to the debate regarding treaties of this nature, *i.e.*, Convention against Torture, etc., the argument is posited that, how could anyone have a reservation about the "clear illegality" of such acts.).

11. As a rule, no reservations may be made to the Rome Statute. Rome Statute, *supra* note 2, art. 120. However, a state may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 (War Crimes) when a crime is alleged to have been committed by its nationals or on its territory. *Id.* art. 124 (Transitional Provision). This provision is a compromise achieved by the Rome Conference at the expense of ensuring that one state supported the Rome Statute. *See generally* HUMAN RIGHTS WATCH, WORLD REPORT: INTERNATIONAL CRIMINAL COURT (1999). This compromise is justified by the fact that the "group of like-minded states" succeeded in obtaining support in prohibiting the possibility of making reservations to the Statute. *Id.* This compromise, being a result of very hot debates, is one of the most important principles of the Statute. *Id.*; *see also* MERAB TURAVA, OPEN SOCIETY—GEORGIA FOUNDATION, ANALYSIS OF COMPATIBILITY OF THE GEORGIAN LEGISLATION WITH THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2001), available at <http://www.osgf.ge/interlaw/ICC -00.htm> (last visited Oct. 7, 2005).

12. Vienna Convention on the Law of Treaties, arts. 19–21, May 23, 1969, 1155 U.N.T.S. 331, 336–7 [hereinafter Vienna Convention].

13. The importance of noting the distinctions between the two is crucial. A reservation binds the reserving states' obligations of a treaty with regard to all signatory states. BARRY E. CARTER ET AL., INTERNATIONAL LAW 114–120 (4th ed., 2003). An understanding merely creates legal obligations for the

sixtieth ratifier at a seemingly unprecedented pace.¹⁴ Currently, there are ninety-eight countries that have ratified the Rome Statute.¹⁵

The Rome Statute was indeed an amalgam of the states' disparate ideologies with a single purpose, to constitute a permanent forum for the international community to bring the worst of criminals to justice. The ICC was going to be a place to end impunity for only the most heinous crimes. Many states prior to ratifying the Rome Statute, including the United States, did not have the domestic legal framework in place to either exercise jurisdiction at the national court level, or their criminal codes were silent or incomplete with regard to the underlying criminal offences. The necessity for legislation, entitling states' domestic jurisdiction, so that their courts could be an appropriate forum was made evident in Rome. Germany had expressed the possibility that the ICC may promote the beginning of a harmonization process of international criminal law amongst states.¹⁶ These gaps in jurisdiction have allowed for the imperfect administration of justice and, in certain situations, have not created mandatory activation of jurisdiction or prosecutorial authority. The Rome Statute was supposed to propose a cure for this inequality and be the world's court for war crimes, crimes against humanity, genocide, and aggression.

Each state's ICC implementing legislation is ripe with political, legal, and distinctive domestic concerns. By distinguishing the states' final legislative products, the United States can begin to conceptualize not only what sections of the Rome Statute have been modified through states' domestic legislation, seeing what issues are generally in play, but also to see whether the United States can replicate the dual successes of other democracies, protecting individual national interests and becoming a member of the ICC regime.

Passing legislation which would incorporate Articles 5 through 8 of the Rome Statute into the United States' federal criminal law would not mandate United States cooperation with the ICC. Congress can propose atrocity crime legislation which does not mention the Rome Statute or the ICC. The Rome Statute is not a self-executing treaty and, therefore, would still require the

reserving state to its own treaty obligations. *Id.* Had the United States been able to lodge a reservation to the Rome Statute, that accordingly did not defeat the object or purpose of the statute itself, ratification of the Rome Statute might have already occurred. *Id.*

14. See Rome Statute, *supra* note 2; see also COALITION FOR THE INTERNATIONAL CRIMINAL COURT, STATE SIGNATURES AND RATIFICATIONS CHART (2005), <http://www.iccnw.org/countryinfo/worldsigsandratiications.html> (last visited Sept. 23, 2005) (containing the most up to date tally of ratified states) [hereinafter SIGNATURES & RATIFICATIONS].

15. SIGNATURES & RATIFICATIONS, *supra* note 14 (The Dominican Republic ratified the Rome Statute on May 13, 2005, bringing the total number of States that are parties to the Statute to 99; 139 States are signatories).

16. Schense & Piragoff, *supra* note 2, at 249.

advice and consent of the United States Senate and a presidential signature before the United States would belong to the group of ratifying member states and be subject to the demands of the court.¹⁷

Only by passing criminal laws that would guarantee United States federal courts jurisdiction over ICC crimes does the United States effectively protect its national interests because, pursuant to Articles 17 and 18 of the Rome Statute, the United States would be willing and able to genuinely carry out the investigation or prosecution.¹⁸ This would effectively make the case initially inadmissible to the ICC. Currently the United States is not technically capable in all circumstances to supplant the ICC's jurisdiction and take full advantage of complementarity.

Section II examines the domestic legislative attempts by five western democracies to implement the Rome Statute. By focusing strictly on the divergences from the text of the Rome Statute and any possible constitutional impediments to implementation, certain reoccurring themes make themselves evident. The United States can benefit from such an examination because the issues that other democracies struggled with can be recognized as either unique to the state in question or inherent to all constitutional democracies. As a result, the dilemmas can be either avoided as unique to the state in question or the solution can be approached in a similar fashion as the other successfully implementing states.

Section III discusses United States' interests in and fears of the ICC regime. Were the ICC to become, as the plenipotentiaries in Rome envisioned, the world's court for atrocity crimes, there are succinct benefits to United States participation. For example, the future administration of the court will not be influenced directly by the United States, nor will the United States be able to contribute to state parties' proposals for additional ICC subject matter jurisdiction.

Section IV comparatively examines the approaches of the other states and applies their individual experiences to the current state of United States law. It is plausible to assume that many of the issues that arose during the implementation processes of the various states would translate in some form or other into issues which might arise, were the United States to attempt to implement the Rome Statute.

Lastly, Section V examines the differing approaches of implementing legislation of four states side-by-side with the Rome Statute. The annexes in this section were collected by the author as an aid to the reader and is the

17. Malvina Halberstam, *International Human Rights and Domestic Law Focusing on U.S. Law, with some Reference to Israeli Law*, 8 CARDOZO J. INT'L & COMP.L. 225, 234 (2000).

18. Rome Statute, *supra* note 2, arts. 17–18.

author's own effort at correlating the various national statutes with the Rome Statute.

II. FIVE STATES' APPROACHES TO RATIFYING THE ROME STATUTE

A. Canada

Canada has the unique distinction of being the first country to adopt comprehensive domestic legislation effectively ratifying the Rome Statute.¹⁹ The Canadian Parliament passed the Crimes Against Humanity and War Crimes Act ("CAHWCA") on June 29, 2000,²⁰ and ratified the Rome Statute on July 7, 2000.²¹ Subsequently, the CAHWCA entered into force on October 23, 2000.²² Dissimilar to the United States process of treaty ratification, the Canadian constitution mandates that any treaty obligation, in which Canada would like to enter, must first be entirely legislated through the parliamentary process before the treaty can be signed.²³ It is for this reason that Canada did not sign the Rome Statute before its parliament had the opportunity to fully legislate the contents of the treaty.²⁴

All of the ICC crimes were incorporated into Canadian domestic law under the CAHWCA.²⁵ Canada did more than merely incorporate the ICC crimes by reference to the Rome Statute into its criminal code,²⁶ which was done for a couple of reasons that will be discussed. Canada went further and made the CAHWCA more extensive by including, for example, retrospective jurisdiction²⁷ and the crime of using chemical weapons,²⁸ a crime which was absent

19. EUR. CONSULT. ASS., *Progress Report by Canada and Appendix*, Doc. No. 11 (2001) [hereinafter *Progress Report by Canada*]; Darryl Robinson, *Implementing International Crimes in National Law: The Canadian Approach*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 45-54 (Matthias Neuner ed., 2003).

20. Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24 (Can.) [hereinafter CAHWCA]; Robinson, *supra* note 19, at 45.

21. See Rome Statute, *supra* note 2; SIGNATURES & RATIFICATIONS, *supra* note 14.

22. HUMAN RIGHTS WATCH, TABLE 1: IMPLEMENTING THE ROME STATUTE (2002), <http://hrw.org/campaigns/icc/docs/chart1.pdf>.

23. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985); see also Robinson, *supra* note 19, at 46.

24. SIGNATURES & RATIFICATIONS, *supra* note 14.

25. Rome Statute, *supra* note 2, arts. 5-8; CAHWCA, *supra* note 20, § 4.

26. CAHWCA, *supra* note 20, § 4.

27. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 11(g) (Eng.) [hereinafter Canadian Charter].

28. See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999).

from the Rome Statute.²⁹ A state can take full advantage of the complementarity jurisdiction and be in compliance with Articles 5 through 8 of the Rome Statute, regarding the crimes of genocide, war crimes, and crimes against humanity, by simply making reference to the Rome Statute Articles 5 through 8 in its implementing legislation.³⁰ Incorporating the Rome Statute's crimes by reference, as the convention declares, does not impede the continued development of customary international law.³¹

Canada had previously focused its legislative competence on war crimes and crimes against humanity.³² In 1987, the Canadian Parliament promulgated domestic law to enable the state to prosecute war crimes and crimes against humanity whether or not they occurred within Canadian territory.³³ Previously, Canadian jurisdiction was mostly based on territoriality.³⁴ The extraterritoriality of the 1987 law could extend globally with regard to the criminal acts, as long as the alleged criminal was on Canadian territory and subject to Canadian law and apprehension regardless of his/her nationality.³⁵ The reality of prosecuting an individual based on the Canadian war crimes statute proved to be insufficient and required additional legal framework to be incorporated for legitimacy purposes. The Canadian Supreme Court in *Regina v. Finta* held that prosecuting an individual in accordance with the 1987 law, for such a serious crime and for one which contained such a grave stigma in the international community, required that the prosecutor incorporate the international as well as the domestic

29. Elaina I. Kalivretakis, *Are Nuclear Weapons Above the Law? A Look at the International Criminal Court and the Prohibited Weapons Category*, 15 EMORY INT'L L. REV. 683, 686–87 (2001). The crime of using chemical weapons covered by the Chemical Weapons Convention was in Article 8 of the Rome Statute until the final week of the Rome Conference when it was decided to drop the provision in order to end the negotiation standstill which had occurred between the Arab/developing countries, who wanted to include the use of nuclear weapons in the Rome Statute, and those countries, of which the United States and Canada were included, who wanted to include the use of chemical weapons. The negotiated compromise was to drop all modern references to weapons based on treaty law. Therefore, it is not surprising that Canada went ahead and included the provision in their implementing legislation.

30. Rome Statute, *supra* note 2, arts. 5–8 (The Rome Statute is arguably referencing established customary international legal principles; those states that had not codified those crimes could do so by making reference to the appropriate Articles in the Rome Statute).

31. *Id.* art. 10.

32. Criminal Code, R.S.C., ch. C-46, §§ 7 (3.71)–(3.77) (1985) (§§ (3.76) and (3.77) repealed 2000) (Can.) [hereinafter Canadian Criminal Code].

33. *Id.*

34. William Schabas, *Canadian Implementing Legislation for the Rome Statute: Jurisdiction and Defences*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 35–44 (Matthias Neuner ed., 2003); see also Canadian Criminal Code, *supra* note 32, § 6(2) (providing exceptions to the territorial jurisdictional rule for extraordinary cases).

35. See Canadian Criminal Code, note 32; Schabas, *supra* note 34, at 35–44.

elements of the crime.³⁶ The bar which the Canadian Supreme Court set was accordingly high, one which is plausibly too high for a prosecutor to prove beyond a reasonable doubt.³⁷

With the *Finta* holding as a marker, Canada looked to its inclusion in the ICC regime as not only a means to amend its criminal code but as an opportunity to integrate the lessons learned from *Finta* and include retrospective jurisdiction.³⁸ While Canada did not have to amend its constitution to incorporate the ICC crimes,³⁹ it did decide to broaden the domestic reach of its courts by utilizing the tool of retrospectivity which allows the Canadian courts to prosecute an individual if the commission of the alleged crime was recognized by customary international law at the time it was committed.⁴⁰ In contrast, Canada decided not to make the ICC crimes retroactive, as some provisions of the Rome Statute are manifestations of the recent developments of customary international law,⁴¹ possibly in an attempt to assure constitutional protections and safeguards.

The CAHWCA provides its own definitions of the ICC crimes.⁴² These definitions are, however, largely consistent with the Rome Statute. Compare the two:

CAHWCA §4(3)

[G]enocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.⁴³

36. Regina v. Finta [1994] 1 S.C.R. 701 (Eng.).

37. *Id.*; Robinson, *supra* note 19, at 47.

38. *Finta*, 1 S.C.R. at 701.

39. CAHWCA, *supra* note 20, § 4(3) & 6(3); Rome Statute, *supra* note 2, arts. 5–8.

40. See *id.* § 6 & 7(5); Section 6(1) states “Every person who, *either before or after the coming into force of this section*, commits outside Canada. . .” and Section 7(5) states “Where an act or omission constituting an offense under this section occurred *before the coming into force of this section*. . .” *Id.*; Rome Statute, *supra* note 2, arts. 11, 24.

41. Robinson, *supra* note 19, at 49.

42. CAHWCA, *supra* note 20, §§ 4(3), 6(3); Rome Statute, *supra* note 2, arts. 5–8.

43. *Id.* § 4(3).

ROME STATUTE ARTICLE 6

For the purpose of this Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group; and
- e) Forcibly transferring children of the group to another group.⁴⁴

Due to Canada's decision to mandate the prosecution of crimes retrospectively, simple reference to the Rome Statute would not suffice. A temporal element had to be included in the definition of the crimes to incorporate the law and make it applicable to the time of the commission of the crime.⁴⁵ Also, the CAHWCA references the Rome Statute's inability to encumber the development of customary international law.⁴⁶ This added element synchronizes the Canadian approach with its treaty obligations, intending to give its courts jurisdiction retrospectively while not stopping the development of customary international law.

Canada did have a substantial constitutional hurdle to negotiate in its legislative process to incorporate Article 28, "Command Responsibility," of the Rome Statute.⁴⁷ It is insightful to further examine the mechanism Canada utilized to mold the intention of Article 28 with its constitutional jurisprudence and the drafting of the CAHWCA due to the possibility that the United States could encounter a similar dilemma in the incorporation of Article 28, or other Articles of the Rome Statute, though most likely not in a constitutional context.

The crime of "Command Responsibility" as delineated in the Rome Statute contains a disjunctive *mens rea* test, allowing for either an objective or subjective test for mental culpability (emphasis added).⁴⁸ The Canadian

44. Rome Statute, *supra* note 2, art. 6.

45. CAHWCA, *supra* note 20, §§ 4, 6.

46. *Id.* § 4(4) (For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law).

47. Rome Statute, *supra* note 2, art. 28.

48. *Id.* ("That military commander or person either knew or, owing to the circumstances at the time,

constitutional practice (Charter of Rights and Freedoms)⁴⁹ requires strict subjectivity for a crime that would reflect the "high degree of moral stigma society subscribes to those convicted of such crimes."⁵⁰ Therefore, the test of "either knew or, owing to the circumstances at the time, should have known" as contained in the Rome Statute Article 28(a)(i) had to be amended.⁵¹

In *Regina v. Vaillancourt*, the Canadian Supreme Court outlawed vicarious criminal liability for such serious crimes as murder, when the *mens rea* requirement is merely subjective.⁵² In response to this quandary, the Canadian Parliament fashioned a new crime, "Breach of Responsibility by a Superior," which pertains to both military and civilian commanders, as required by the Rome Statute, Article 28(a) and (b).⁵³ A person found guilty of the Canadian crime of "Breach of Responsibility by a Superior" can possibly receive the same sentence as someone who has been found guilty for direct commission of an Article 5 crime.⁵⁴ This assures the required Article 28 result.⁵⁵

Canada was able to secure the inclusion of Article 28 of the Rome Statute by utilizing its Supreme Court's constitutional jurisprudence as a guide, and securing the adherence to the Canadian Constitution (Charter of Rights and Freedoms) but not diverge too greatly from the purpose and meaning of Article 28 of the Rome Statute.

Under the CAHWCA, a military commander or superior would be guilty of an Article 5 crime if a military commander either "failed to exercise proper control over a subordinate" and, as a result, an Article 5 offence was committed⁵⁶ or "knew, or was criminally negligent in failing to know" that a subordinate is "about to or is committing" an Article 5 offence,⁵⁷ including consciously disregarding evidence that clearly indicated that an Article 5 offence was being committed or was about to commit such an offence and "failed to take, as soon as practicable, all necessary and reasonable measures to

should have known. . . ."); *Progress Report by Canada*, *supra* note 19, at 3.

49. Canadian Charter, *supra* note 27.

50. *Finta*, 1 S.C.R. at 701.

51. Rome Statute, *supra* note 2, art. 28(a)(i).

52. *Regina v. Vaillancourt* [1987] S.C.R. 636 (Eng.); Robinson, *supra* note 19, at 52.

53. Rome Statute, *supra* note 2, art. 28 (including explicitly both a military, under Article 28(a), and a civilian under Article 28(b), component regarding Command Responsibility); see also CAHWCA, *supra* note 20, § 5.

54. CAHWCA, *supra* note 20, § 5(3) ("Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life").

55. Rome Statute, *supra* note 2, art. 77-1(b) ("A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. . . .").

56. CAHWCA, *supra* note 20, §§ 5(1)(a)(i), 7 (for offences occurring outside of Canada).

57. *Id.* §§ 5(1)(b), 7 (for offences occurring outside of Canada).

prevent or repress the commission of the offence or of further offences," or submit the matter to competent authorities for investigation and prosecution.⁵⁸ Military commanders and others would be liable also for having attempted to, committed, conspired, counseled, or been an accessory to any Article 5 crimes outside of Canada.⁵⁹

The CAHWCA was able to solve the constitutional dilemma by circumventing the disjunctive *mens rea* test in Article 28 of the Rome Statute and creating a new law which gave equal effect of Article 28 but fit within the established constitutional confines delineated in *Regina v. Vaillancourt* and *Regina v. Finta*. Also, the punishment for the crime of breach of "Command Responsibility" can be life imprisonment, identical to that of the Article 28 of the Rome Statute, adding credence to Canada's adherence to the Rome Statute in general.

The ICC has complementary jurisdiction with the Canadian legal system.⁶⁰ The ICC can obtain jurisdiction only if Canada were to have jurisdiction over the offence (or suspect) and were unwilling or unable to investigate or prosecute an alleged crime or suspect.⁶¹ The Canadian jurisdiction is, however, subject to both a presence requirement and a consent requirement.⁶² There cannot be a trial in absentia; however, an investigation can occur without the detention of a suspect of the alleged crime.⁶³ The Attorney General's written consent is required before a prosecution can proceed.⁶⁴ Also, the CAHWCA prescribes a

58. *Id.*

59. *Id.* § 6(1.1).

60. Rome Statute, *supra* note 2, art. 1 ("[the International Criminal Court] shall be complementary to national criminal jurisdictions").

61. *Id.* art. 18(3) ("The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation." Article 17(1)(a), states that, "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . .").

62. CAHWCA, *supra* note 20, §§ 9(2)-(4).

63. *Id.* § 9(2) ("For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply").

64. *Id.* §§ 9(3),(4) (Procedures and Defences section) (No proceedings for an offence under any of sections 4 to 7 of this Act, or under section 354 or subsection 462.31(1) of the Criminal Code in relation to property or proceeds obtained or derived directly or indirectly as a result of the commission of an offence under this Act, may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf. . . No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada).

mandatory sentence of life imprisonment for the intentional commission of an ICC crime and a maximum sentence of life imprisonment in any other case.⁶⁵

Finally, as prescribed in the Rome Statute, there are no immunities⁶⁶ and no applicable statutes of limitation⁶⁷ for the Rome Statute Article 5 crimes⁶⁸ in the CAHWCA. Canada can, as the United States continues to do, enter into bilateral "Article 98 Agreements," even though the enforceability and requisite verbiage is still open for judicial interpretation.⁶⁹

In sum, Canada had, prior to the Rome Statute, domestically legislated crimes against humanity and war crimes into their criminal code.⁷⁰ The subsequent difficulty Canada had with effectively prosecuting individuals under the new laws allowed for Canada to take advantage of the Rome Statute to build upon the experience and revamp their criminal code. Furthermore, Canada decided to broaden its jurisdiction of ICC crimes through the use of retrospection and, as a result of that decision, incorporating the ICC crimes by reference to the Rome Statute was not possible. A temporal element had to be included which reflected the decision to utilize retrospectivity. The crime of using chemical weapons was incorporated in the CAHWCA. This crime was absent from the final version of the Rome Statute and is evidence of the highly politicized and heavily negotiated nature of the Rome Statute.

As some of the Rome Statute is reflective of more recent developments of customary international law, Canada prudently decided to forgo the use of retroactivity, allowing for past acts to be judged by the customary law that governed at the time of the commission of the crime. Lastly, Canada negotiated through the Rome Statute's requirements of "Command Responsibility" using its constitutional jurisprudence as the guide. The Canadian Supreme Court had found vicarious criminal liability for serious crimes, like murder, unconstitutional and required subjective *mens rea* requirements for adjudication.

65. *Id.* §§ 4(2)(a), 4(2)(b), 5(3), 6(a), 6(b), 7(4), 15(1)(a)–(d), 15(1.1), 15(2), 15(3), 15(5).

66. Rome Statute, *supra* note 2, art. 27; CAHWCA, *supra* note 20, § 3.

67. Rome Statute, *supra* note 2, art. 29; see generally CAHWCA, *supra* note 20.

68. Rome Statute, *supra* note 2, art. 5.

69. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, US BILATERAL IMMUNITY OR SO-CALLED "ARTICLE 98" AGREEMENTS (2003), available at <http://www.globalpolicy.org/intljustice/icc/2003/0606usbilaterals.htm> (Among other rationale, some legal scholars and those involved in the Rome Conference negotiations have declared that the United States Article 98 agreements are contrary to the language of Article 98 itself. The proposed agreements attempt to amend the terms of the Rome Statute by ostensibly canceling out the concept of 'sending state' from Article 98(2). 'Sending state' indicates that the language of Article 98(2) is intended to cover only SOFAs, SOMAs and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit should be addressed) [hereinafter Article 98 Agreements].

70. See Canadian Criminal Code, *supra* note 32.

Therefore, Canada fashioned a new crime with subjective criteria to assure that the stigma that a conviction for such a heinous crime would carry has sufficient due process.

B. Australia

On January 9, 2002, Australia's legislation which domestically implemented the Rome Statute came into effect without requiring amendments to the Australian constitution.⁷¹ The International Criminal Court Act of 2002 ("ICC Act") and the International Criminal Court ("Consequential Amendments") Act of 2002 ("ICCCA") were passed by parliament on June 27, 2002.⁷² Australia then ratified the Rome Statute on July 1, 2002, becoming the seventy-fifth state to ratify.⁷³ The ICC Act is mainly focused on the procedural elements, such as cooperation, arrest, and extradition between Australia and the ICC, and is therefore less important for the purposes of this discussion.⁷⁴

The more pertinent act is the ICCCA which not only codified the elements of each crime in painstaking detail and the corresponding maximum sentences, but also, *inter alia*, made the necessary modifications to the Australian Criminal Code.⁷⁵ The ICCCA contains all the major crimes in Articles 5 through 8 of the Rome Statute except Article 8(2)(b)(xx).⁷⁶ The subsection makes reference to

71. See Rome Statute, *supra* note 2; See International Criminal Court Act, 2002, No. 41 (Austl.) [hereinafter Australia ICC Act]; Hon. Darryl Williams, Commonwealth Attorney General, Speech to International Society for the Reform of Criminal Law regarding the International Criminal Court: The Australian Experience (Aug. 30, 2001), http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_The_International_Criminal_Court:_The_Australian_Experience (in a speech by the former Australian Attorney-General, Darryl Williams (1996-2003), he stated "The constitutionality of the proposed legislation giving effect to the ICC is one of the issues raised by some critics of Australian ratification. The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution").

72. See Australia ICC Act, *supra* note 71; International Criminal Court (Consequential Amendments) Act, 2002, No. 42, at 2 (Austl.) [hereinafter Australia ICCCA Act] (an act to amend the Criminal Code Act 1995 and certain other acts in consequence of the enactment of the International Criminal Court Act 2002, and for other purposes).

73. See Rome Statute, *supra* note 2; See COALITION FOR THE ICC, AUSTRALIA (2005) <http://www.iccnw.org/countryinfo/oceania/australia.html> (last visited Sept. 12, 2005).

74. See Australia ICC Act, *supra* note 71.

75. See Australia ICCCA Act, *supra* note 72.

76. *Id.*; Rome Statute, *supra* note 2, art. 8(2)(b)(xx) ("Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123. . .").

an annex to the Rome Statute which was not included in the final version of the Rome Statute and was supposed to delineate certain “weapons, projectiles and materials, and methods of warfare” in accordance with Article 8(2)(b)(xx).⁷⁷ The first substantive provision of the ICCCA, subdivision B, begins with the crime of genocide, Article 6 of the Rome Statute.⁷⁸ This marks the first time that the crime of genocide is established in Australian law, although there had been previous legislative attempts to do so by the Australian Parliament.⁷⁹ There are five offences of the crime of genocide as it appears in the Rome Statute, and the ICCCA mirrors both the elements and the offences.⁸⁰

However, the ICCCA does not require that the genocidal conduct take place in a “manifest pattern of similar conduct,” as is required in the Elements of Crimes.⁸¹ Intent alone suffices for prosecution.⁸² The lack of this element should ease the burden of the prosecution to convict an alleged perpetrator. Also, it solidifies the fact that complementarity jurisdiction can not only be invoked by Australia, making conviction easier for Australian courts than for the ICC, but that any prosecution would be upheld by the ICC in accordance with Article 19(2)(b) of the Rome Statute.

Subdivision C of the ICCCA creates the criminal offence of crimes against humanity and follows Article 7 of the Rome Statute.⁸³ The detailed subsections, beginning with 268.8, flesh out the elements of each crime.⁸⁴ The only deviation from the Rome Statute appears with the unique approach that Australia took regarding the crime against humanity of the “forced disappearances of persons” by dividing it into two parts thus broadening the reach of the crime beyond that of the Rome Statute.⁸⁵ The two sections differ with regards to the person who refuses to acknowledge the criminal act of “forced disappearance.”⁸⁶ Section 268.21(1)(e) places the judicial focus on the government or organization responsible for the forced disappearance, while section 268.21(2)(h) focuses on

77. Rome Statute, *supra* note 2, art. 8(2)(b)(xx).

78. Australia ICCCA Act, *supra* note 72, §§ B; Rome Statute, *supra* note 2, art. 6.

79. Timothy L.H. McCormack, *Australia's Legislation for the Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 70, 71 (Matthias Neuner ed., 2003).

80. Rome Statute, *supra* note 2, art. 6; See Australia ICCCA, *supra* note 72.

81. INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES, ELEMENTS OF CRIMES, ICC-ASP/1/3 (2002) [hereinafter ELEMENTS OF CRIMES].

82. *Id.*

83. Rome Statute, *supra* note 2, art. 7(1)(a)–(k); see also Australia ICCCA Act, *supra* note 72, §§ C 268.8–268.23 (Rome Statute art. 7(1)(a)–(k) corresponds to §§ C 268.8–268.23 of the Australia ICCCA Act).

84. Australia ICCCA Act, *supra* note 72, §§ C 268.8–268.23.

85. Rome Statute, *supra* note 2, art. 7-1(i); Australia ICCCA Act, *supra* note 72, §§ C 268.21; McCormack, *supra* note 79, at 71.

86. Australia ICCCA Act, *supra* note 72, §§ 268.21(1),(2).

the 'perpetrator' of the forced disappearance who refuses to acknowledge the forced disappearance.⁸⁷ By bifurcating Article 7(2)(i) of the Rome Statute, it assures that the crime will not go unpunished by simply denying either actual complicity in the criminal act or the official condoning of such acts by a representative group.⁸⁸ This complies with the general tenor of ending impunity in the Rome Statute.

Australian history, similar to that of the United States, evidences episodes of unjust dealings with the indigenous population of that continent.⁸⁹ This may explain in part the motivation of the Australian Parliament to not make the crime of genocide retrospective in its application, as Canada decided to do, but rather apply the new law going forward as of July 1, 2002. Article 6(e) of the Rome Statute criminalizes the forced transferring of children of one group to that of another group.⁹⁰ The Australian government has in the past taken children of aboriginal Australians and placed them elsewhere in an attempt to acculturate the indigenous Australians.⁹¹

Australia had attempted to employ the tool of universal jurisdiction as it pertained to criminal prosecutions of non-Australian citizens for crimes perpetrated against non-Australian citizens, specifically Nazi war criminals who had taken residence in Australia after the Second World War.⁹² Australia went so far as to grant universal jurisdiction over the crimes in the Rome Statute to the Australian courts.⁹³ Again, this may have been done to assure primacy over any case in which the ICC may have an interest. The Australian Attorney General is required to give his written consent before a prosecution can proceed, however, investigation *in absentia* may occur.⁹⁴

In sum, Australia first codified the crime of genocide in the ICCCA by duplicating the offences in the Rome Statute, but the ICCCA does not require that the genocidal conduct take place in a "manifest pattern of similar conduct," as is required in the Elements of Crimes.⁹⁵ The crime of forced disappearances

87. *Id.*

88. *Id.*; Rome Statute, *supra* note 2, art. 7(2)(i).

89. See generally Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L. L. 387 (2002) (discussing history of indigenous Australians).

90. Rome Statute, *supra* note 2, art. 6(e).

91. See Legg, *supra* note 89, at 389.

92. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 n.91 (1991).

93. See generally Australia ICCCA Act, *supra* note 72.

94. *Id.* pt. 3 (allows for a suspect to be arrested, charged, remanded to custody or released on bail before the AG's consent is obtained).

95. ELEMENTS OF CRIMES, *supra* note 81.

was divided into two crimes, with each focusing on the *mens rea* of distinct suspects, either governmental perpetrators or individual (non-governmental) perpetrators.⁹⁶ Finally, universal jurisdiction was granted for all crimes in the Rome Statute, however, there is no retrospectivity jurisdiction for the crime of genocide. It would appear that the deviations from the Rome Statute were to assure the Australian courts jurisdiction over crimes in which the ICC could have an interest and to possibly ease prosecutors' burdens for prosecution.

C. United Kingdom

The United Kingdom government had proclaimed its intention to be one of the first sixty states to ratify the Rome Statute.⁹⁷ Making good on this pledge, the United Kingdom signed the Rome Statute on November 30, 1998, then subsequently ratified it on October 4, 2001, becoming the forty-second state to do so.⁹⁸ As with dualist nations, until necessary domestic legislation is passed, a foreign treaty cannot be ratified. Further, the United Kingdom legal system does not allow self-executing treaties. Therefore, the United Kingdom ratification process does not allow for any international treaty obligations of the sovereign to be ratified until domestic legislation codifying the treaty obligations is passed through the parliamentary process.⁹⁹

The United Kingdom had an arguably more simplified legislative route to maneuver in order to ratify the Rome Statute due to its lack of any formal constitution. There were no insurmountable hurdles which would require modifying the fundamental source of domestic law. This does not mean, however, that the United Kingdom legal system is amenable to any and all proposed legislation. The United Kingdom common law has defined the boundaries of its society for centuries.

The United Kingdom passed the International Criminal Court Act ("ICC Act") in 2001,¹⁰⁰ which applies predominantly to England, Wales, and Northern Ireland,¹⁰¹ paving the way for ratification. Scotland adopted its own ICC Act the same year¹⁰² due to the fact that the Scottish Parliament has autonomy over the drafting and inclusion of criminal statutes for its territory. The

96. *Id.*

97. EUR. CONSULT. ASS., *Progress Report by the United Kingdom*, Doc. No. 31 (2001) [hereinafter *Progress Report by U.K.*].

98. See Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14.

99. Schense & Piragoff, *supra* note 2, at 248.

100. See International Criminal Court Act, 2001, c. 17 (U.K.) [hereinafter U.K. ICC Act]; John A. Gilbert, *The United Kingdom's Approach to Implementation of the Rome Statute*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 55 (Matthias Neuner ed., 2003).

101. See *Progress Report by the U.K.*, *supra* note 97.

102. International Criminal Court (Scot.) Bill, 2001, (S.P. Bill 27A).

parliamentary process comprises debates in both houses, the Commons and the Lords, approval by both houses, and royal consent.

The United Kingdom took a pragmatic approach to ratifying the Rome Statute. According to John A. Gilbert, a Grade 7 in the Home Office's Criminal Policy Group, the United Kingdom's "aim has been to assure that the offences under the Rome Statute can be effectively and successfully prosecuted in our domestic courts."¹⁰³

The United Kingdom incorporated the ICC crimes, in large part, by simple reference to the Rome Statute Articles 6 through 8 crimes,¹⁰⁴ and included the possibility of the crime of aggression in Article 9.¹⁰⁵ The ICC Act does not define any of the crimes in detail, but refers judges to the ICC Elements of Crimes.¹⁰⁶ Many of the crimes, however, had already been codified by the United Kingdom Parliament, and the concern was whether the incorporation of those crimes, pursuant to the wording of the Rome Statute, would suffice for ratification purposes.¹⁰⁷ The United Kingdom was apparently cognizant while drafting the law for fear of not implementing the Rome Statute in its entirety and thus included the mention of Article 9 in its implementing legislation.

The United Kingdom broadened its extradition law through the ICC Act 2001 by empowering its judicial system to extradite a suspect who has been accused of the crime of genocide, war crimes, or crimes against humanity, to a third-party state who has universal jurisdiction over the alleged crime even though the United Kingdom may not have jurisdiction.¹⁰⁸ The United Kingdom did this by adding to section 51(2)(b). This eliminated the criterion of dual criminality, which attaches a criminal specter to any person who is either a United Kingdom citizen, resident, or is somehow subject to United Kingdom

103. Gilbert, *supra* note 100, at 57.

104. U.K. ICC Act, *supra* note 100, §§ 50, 51.

105. (1) In this Part- "genocide" means an act of genocide as defined in Article 6, "crime against humanity" means a crime against humanity as defined in Article 7, and "war crime" means a war crime as defined in Article 8.2.

...

(2)(a) any relevant Elements of Crimes adopted in accordance with Article 9. . . .

U.K. ICC Act, *supra* note 100, § 50 (the crime of aggression is referred to in subpart (2)(a)).

106. (2) In interpreting and applying the provisions of those Articles the court shall take into account—

(a) any relevant Elements of Crimes adopted with Article 9, and

(b) until such time as Elements of Crimes are adopted under that Article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the ICC adopted on 30th June 2000.

UK ICC Act, *supra* note 100, § 50(2).

107. See Progress Report by the U.K., *supra* note 97.

108. See U.K. ICC Act, *supra* note 100, §§ 71–73 (these sections deal with extradition); GILBERT, *supra* note 100, at 61.

service of process jurisdiction,¹⁰⁹ and has allegedly committed any of the ICC crimes outside the United Kingdom, but is considered a crime.

Also, sections 52 and 59 of the ICC Act give United Kingdom courts the ability to extradite indicted suspects for crimes ancillary to genocide, war crimes, and crimes against humanity.¹¹⁰ Ancillary crimes are defined in sections 55 and 62 of the ICC Act as:

- 1) Aiding and abetting;
- 2) Counseling or procuring the commission of an offence;
- 3) Inciting a person to commit an offence;
- 4) Attempt or conspiring to commit an offence;
- 5) Assisting an offender; and
- 6) Concealing an offence.¹¹¹

Section 72 of the ICC Act, which closes the door on harboring international criminals for good, is an innovative approach to assure rule of law worldwide.¹¹² The ICC Act also removes the dual-criminality extradition rule so that states which have a broader criminal jurisdiction can extradite a suspect from the United Kingdom.¹¹³

The consent of the Attorney General is required before any prosecution can commence.¹¹⁴ Interestingly, the United Kingdom did not incorporate the general principles of law, like defenses, because there is very little divergence between the United Kingdom criminal provisions and those in the Rome Statute which correspond.¹¹⁵ However, Article 28 of the Rome Statute, "Command Responsibility," is replicated.¹¹⁶

D. Germany

For historical reasons, Germany had a moral obligation to not take a passive role in implementing the Rome Statute. The Rome Statute and the ICC are the direct progeny of the Nuremberg Tribunal which was convened as a result of the Nazi war of aggression and the perpetration of atrocities during the

109. U.K. ICC Act, *supra* note 100, § 51(2)(b).

110. *Id.* §§ 52, 59.

111. *Id.* §§ 55, 62.

112. *Id.* § 72.

113. *See Regina v. Bartle and the Commissioner of Police for the Metropolis and Others EX Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others EX Parte Pinochet*, [1999] A.C. (appeal taken from Q.B.) (discussing the dual criminality rule).

114. U.K. ICC Act, *supra* note 100, §§ 53(3), 60(3).

115. U.K. ICC Act, *supra* note 100, pt. 3, 4 (numerating the rights of the accused suspect during the investigative stage); GILBERT, *supra* note 100, at 59.

116. U.K. ICC Act, *supra* note 100, § 65; Rome Statute, *supra* note 2, art. 28.

Second World War.¹¹⁷ Germany should be commended for its ICC implementing legislation, as it generally broadens the scope of German jurisdiction for both its courts, and with regard to specific criminal acts. It has, since the Berlin Conference, manifestly supported the implementation of the Rome Statute, evidenced by the subsequent amendment to its constitution allowing for the extradition of its nationals to other competent judicial *fora*.¹¹⁸ Germany also declared that the ICC may promote the beginning of a harmonization process of international criminal law amongst states.¹¹⁹ With its implementing legislation, Germany not only recognizes its international treaty obligations by incorporating language from the Geneva Convention and the Optional Protocols into the code, but has made a concerted effort to legislate a modern and functional legal framework to assure that the types of crimes that had been committed by past German governments never occur again or at least do not go unpunished.¹²⁰

Germany ratified the Rome Statute on December 11, 2000, becoming the twenty-fifth ratifying state.¹²¹ The legislature in Berlin passed the new German Code of Crimes Against International Law ("CCAIL"), called in German, *Völkerstrafgesetzbuch*, which entered into force on June 30, 2002.¹²² Prior to the enactment of the CCAIL, Germany had not codified such crimes as crimes against humanity and war crimes as such. However, Germany had previously codified the crime of genocide in 1955 when Germany ratified the Genocide Convention.¹²³ The only change made in the 1955 Genocide Convention was to update the antiquated terminology so as to bring the CCAIL into line with the Rome Statute, more common usage of terms, and move the crime into the part of the criminal code dealing with crimes against international law.¹²⁴

German lawmakers decided to utilize the CCAIL drafting exercise to codify only those crimes and principles of international criminal law that were

117. DINAH L. SHELTON, *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT*, ix–xi (Dinah Shelton ed., 2000).

118. Schense & Piragoff, *supra* note 2, at 249; GRUNDGESETZ [GG] [Constitution] (F.R.G.).

119. Schense & Piragoff, *supra* note 2, at 254.

120. *Id.*

121. Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14.

122. See Act to Introduce the Code of Crimes against International Law, 2002, (Germany) [hereinafter German CCAIL Act]; see COALITION FOR THE ICC, GERMANY (2005) <http://www.iccnw.org/countryinfo/europecis/germany.html> (last visited Sept. 12, 2005).

123. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 (Germany's accession occurred on Nov. 24, 1954) 119 [hereinafter Genocide Convention].

124. *Id.*; see also Andreas Zimmermann, *Main Features of the new German Code of Crimes against International Law*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 140 (Matthias Neuner ed., 2003) (updating such terminology in the crime of genocide by switching *durch ihr Volkstum bestimmt*, a group determined by their nationality, with *ethnische Gruppe*, an ethnic group).

novel to the German Code, not completely revamp the criminal code.¹²⁵ Some of the deviations from the Rome Statute which were incorporated into the CCAIL broaden the scope of German jurisdiction. For example, section 6(1) of the CCAIL mandates that the killing of a single member of a protected group can constitute genocide if the perpetrator acted with the requisite *mens rea*.¹²⁶ The Rome Statute, on the other hand, in Article 6(a), clearly states that there must be multiple killings for it to be considered genocide, as it says, “[K]illing members of the group. . . .”¹²⁷ By lowering the *actus reus* threshold for genocide and correctly focusing on the *mens rea* of the perpetrator, additional indignity, violence, and inhumanity is not required to be visited upon more than one person before an ICC crime is committed.

Germany availed itself of universal jurisdiction prior to the incorporation of the CCAIL.¹²⁸ However, with the inclusion of the CCAIL into German law, the principle of universal jurisdiction would apply to all criminal offences against international law included in the CCAIL even if there is no linkage between Germany and the crime.¹²⁹ This specification, as Germany had proposed at the ICC Preparatory Committee negotiations in 1998,¹³⁰ is commendable and truly an example of universal jurisdiction. The prosecutors are given wide discretion whether to investigate an ICC crime due to the fear that German courts would be continuously congested with extraterritorial claims in search of a credible judicial forum.¹³¹ Germany supercedes not only its fellow ICC brethren-states, but the Rome Statute itself¹³² with regard to the reach of German jurisdiction as it pertains to the ICC crimes.

125. See German CCAIL Act, *supra* note 122; Matthais Neuner, *General Principles of International Criminal Law in Germany*, in NATIONAL LEGISLATION INCORPORATING INTERNATIONAL CRIMES 105 (Matthias Neuner ed., 2003).

126. German CCAIL Act, *supra* note 122, § 6(1).

127. Rome Statute, *supra* note 2, art. 6(a) (emphasis added).

128. The four Geneva Conventions include: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Germany had already availed itself of universal jurisdiction for the crime of genocide and for the crime of murder against “protected persons” as defined in the Geneva Convention.) [hereinafter Geneva Conventions].

129. German CCAIL Act, *supra* note 122, § 1.

130. See generally Johan D. Van der Vyver, Personal Territorial Jurisdiction of the International Criminal Court, 14 EMORY INT’L L. REV. 1 (2000).

131. Neuner, *supra* note 125, at 107.

132. See generally Rome Statute, *supra* note 2 (There is no specific requirement of universal jurisdiction for signatory or domestic ratification purposes).

Many of the German deviations from the Rome Statute are due to considerations focusing specifically on the preference of using language that had been previously utilized in the German criminal law and therefore can successfully prosecute those suspected of committing ICC crimes.¹³³ This may be accomplished because it requires less judicial interpretation and may reflect administrative ease for prosecutors and defense counsel. As new terminology is incorporated, judicial interpretation is, at times, required to parse out the meaning as it is applied to a specific circumstance. With no ICC interpretations currently available and no jurisprudence to build upon, the German courts would rely on German usage as well as international judicial usage. The uncertainty of definitional meanings may cause some to question the judicial findings and ultimately the due process rights granted suspects. Therefore, balancing the use of well-established terminology in domestic jurisprudence and the inclusion of novel legal principles is crucial in the domestic debate regarding domestic legislation incorporating the Rome Statute.

Other language diverges from the Rome Statute as a result of German law makers questioning the developmental stage of certain customary legal principles.¹³⁴ As the Rome Statute evidences intense negotiation, it may not reflect the current state of customary international law. Germany apparently decided to forgo any negotiated regression and to bring its criminal code up to date with customary international law, understanding presumptively, that codifying the current state of customary law, it would not prejudice or hinder the continuing development of customary international law for domestic prosecution purposes.¹³⁵

Finally, deviations from the Rome Statute apparently were calculated to encompass those international legal obligations, embodied in the Genocide Convention and Geneva Convention and Optional Protocols, which were not incorporated into the Rome Statute.¹³⁶ One can assume that in some parts of the CCAIL, treaty language was chosen over the Rome Statute language because Germany wanted to broaden, not narrow, the scope of the CCAIL.¹³⁷ This does not only assure Germany's capability to benefit from complementarity over any ICC case, but it stands as an indicator to the international community of

133. Neuner, *supra* note 125, at 136.

134. Zimmerman, *supra* note 124, at 139 (discussing that the German CCAIL brings Germany's criminal code up to date with customary international law).

135. Rome Statute, *supra* note 2, art. 10.

136. Rome Statute, *supra* note 2; Zimmerman, *supra* note 124, at 138; *See also* Geneva Conventions, *supra* note 128; Genocide Convention, *supra* note 123.

137. *See generally* Rome Statute, *supra* note 2 (The Rome Statute was heavily negotiated and therefore certain provisions may reflect more of a political compromise than the current status of customary international law.).

Germany's commitment to the rule of law and ending impunity for those who choose to ignore it.

E. France

French ratification of the Rome Statute experienced a major obstacle which could have derailed French involvement in the ICC, and had it not been for the stalwart desire and will of the French to link themselves to the concept of the ICC, this hurdle may have proven insurmountable. Although most treaty obligations in civil law states become part of the national law when ratified, France holds its constitution above any international legal obligation and requires a constitutional amendment for any conflicting treaty obligation.¹³⁸ France, which is a civil law state, may submit any possibly conflicting treaty obligation to the constitutional court for interpretation.¹³⁹

France signed the Rome Statute on July 18, 1998, and due to the constitutional dilemmas which subsequently arose, almost two years transpired before France was able to ratify the statute, which ultimately occurred on June 9, 2000.¹⁴⁰ Subsequent to the official expression of the French government of its intention to ratify the Rome Statute and its initial signature in 1998 at the Rome Conference, both the French President and the Prime Minister requested on December 24, 1998, that the French Constitutional Court issue a ruling on the constitutionality of the Rome Statute.¹⁴¹

The constitutional court held that not only was Article 27¹⁴² of the Rome Statute in direct contradiction to the protections provided for by Articles 26,¹⁴³

138. Schense & Piragoff, *supra* note 2, at 238.

139. *Id.* at 248.

140. See Rome Statute, *supra* note 2; SIGNATURES & RATIFICATIONS, *supra* note 14 (showing when France ratified the Rome Statute).

141. CC decision no. 98-408DC, Jan. 22, 1999, J.O., available at <http://www.conseil-constitutionnel.fr/langues/anglais/a98408dc.pdf> (the Constitutional Court's Decision regarding the incompatibility of Article 27 of the Rome Statute and the French Constitution) [hereinafter Const. Council].

142. Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Statute, *supra* note 2, art. 27.

143. La Constitution du 4 Octobre 1958 CONST. art. 26 (Fr.) (No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the

68,¹⁴⁴ and 68-1 of the French Constitution for officials and heads of state in the official capacity,¹⁴⁵ but that Articles 17 and 20 together,¹⁴⁶ and Article 99(4)¹⁴⁷ of the Rome Statute had to be addressed by the French legislature due to conflicts between French constitutional principles and the authority of the ICC as granted by the Rome Statute.

The French Constitutional Court found that the constitution, which strictly forbade any judicial organ other than the French High Court of Justice to indict the President of the Republic, had to be amended prior to ratification.¹⁴⁸ The President of the Republic enjoyed an absolute immunity which the Rome Statute would not recognize.¹⁴⁹ The constitutional spotlight also fell upon the members of the French Parliament.¹⁵⁰ The constitutional court, focusing on the immunities enjoyed by French Parliamentarians with respect to the opinions they espouse and the votes which they cast, held that Article 27 of the Rome

exercise of his duties. No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the assembly of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed *flagrante delicto* or a final sentence. The detention, subjection to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the assembly of which he is a member so requires. The assembly concerned shall convene as of right for additional sittings in order to permit the preceding paragraph to be applied should circumstances so require.) [hereinafter France Const.].

144. France Const., *supra* note 143, art. 68 ("The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical vote in open ballots and by an absolute majority of their members. He shall be tried by the High Court of Justice.").

145. France Const., *supra* note 143, art. 68(1) (Members of the Government shall be criminally liable for acts performed in the exercise of their duties and classified as serious crimes or other major offences at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice of the Republic shall be bound by such definition of serious crimes and other major offences and such determination of penalties as are laid down by statute.).

146. Rome Statute, *supra* note 2, art. 17, 20; Articles 17 and 20 taken together of the Rome Statute, according to the French Constitutional Court, would allow the ICC to:

[L]egitimately take jurisdiction based on a single application of a law of pardon or of domestic rules regarding prescriptions. In such cases, France apart from any unwillingness or inability of the State, could be forced to arrest and hand over a person to the Court for the sole reason that the acts are covered, according to French law, by pardon or prescription.

Olivier Barrat, CSIL Beijing Symposium on the Comparative Study of the International Criminal Law and the Rome Statute, Ratification and Adoption: The French Perspective 2 (2003).

147. Rome Statute, *supra* note 2, art. 99(4).

148. See Const. Council, *supra* note 141.

149. See *id.* ¶ 15.

150. *Id.*

Statute violated this constitutional safeguard.¹⁵¹ The court held that Article 26 of the French Constitution did not allow for members of parliament to be arrested for a serious crime, "nor be subjected to any other custodial or semi-custodial measure without the authorization of the bureau of the assembly of which they are a member," and that, "such authorization is not required in the case of a serious crime or other major offence committed *flagrante delicto*."¹⁵²

Regarding the concept and function with which "complementarity" would play in the administration of jurisdiction between the ICC and France, the constitutional court held that restrictions to the principle of "complementarity" were defined and based in the rule *pacta sunt servanda*, a concept which is "clear and well-defined."¹⁵³

The constitutional court also found that the powers of the ICC Prosecutor, as prescribed by the Rome Statute, were usurping the fringes of national sovereignty; specifically that the ICC Prosecutor is empowered to act on French territory without oversight of the national authorities.¹⁵⁴ To some pundits, the infringements on the French Constitution were quasi-ethereal, for example, the attack on the constitutional principle of "the essential conditions of the exercise of national sovereignty" due to the ICC Prosecutor's unconstrained powers.¹⁵⁵

Ultimately, France chose a legislative path which circumvented the constitutional obstacles it faced. By an overwhelming vote of 858 to six, France amended its Constitution, inserting a new Article, Article 53-2, which states, "[t]he Republic recognizes the jurisdiction of the ICC according to the conditions articulated by the treaty signed on July 18, 1998."¹⁵⁶ The French approach is apparently stated so as to thwart the necessity of creating an exception to specific constitutional Articles.¹⁵⁷

Arguably, there remains a fundamental hurdle still to negotiate regarding the approach which the French took to incorporate the obligations contained within the Rome Statute. It seems that there has been no conclusive judicial determination regarding whether the French amendment will ultimately create constitutional inconsistencies, but one can reasonably assume that as the

151. See *id.* ¶ 5.

152. *Id.* ¶ 16.

153. See Const. Council, *supra* note 141; Int'l Comm. of the Red Cross, *Issues Raised with Regard to the Rome Statute of the International Criminal Court by National Constitutional Courts, Supreme Courts and Councils of State*, at 1 (Jan. 2003).

154. See Const. Council, *supra* note 141.

155. See France Const., *supra* note 143; Barrat, *supra* note 146, at 2.

156. France Const., *supra* note 143, art. 53(2); Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 9 (2001).

157. Venice Commission, *Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court*, CDL/2000/104 (Jan. 15, 2001).

circumstances arise, the French courts will sort out the hierarchy and procedures for meeting the obligations contained within the Rome Statute.

Appending the constitution by simply inserting language which "recognizes the jurisdiction of the ICC according to the Rome Statute" may signify that conditions contained within the Rome Statute have been elevated to those with constitutional primacy. Accordingly, all obligations under the Rome Statute would have the full weight of the constitution behind them. This may create inherent contradictions and inconsistencies within the French constitutional practice.

According to French law, the French Constitution reigns as supreme law on French territory, but mandated inaction in accordance with constitutional tenets may require action under the Rome Statute.¹⁵⁸ For example, since the French constitution has higher standing than international treaties, those who enjoy immunity as prescribed under the constitution and cannot be prosecuted in French courts may have to be extradited to the ICC upon its exercise of jurisdiction over the individual for alleged criminal acts.¹⁵⁹ Thus, what was an absolute immunity guaranteed by the constitution is now merely an abdication to the ICC of custody and, in effect, is no immunity at all. The constitutional inconsistency is, however, in accordance with the obligation to strip immunity of persons suspected of committing an ICC crime.

Although the approach the French utilized suffices to ratify the Rome Statute, subsequent French and ICC jurisprudence will detail the adequacy of the approach taken by the French government.

III. THE UNITED STATES' PERSPECTIVE

A. Discussion of United States' Interests

The approaches that the five countries took in legislating their unique versions of the Rome Statute are paradigmatic of a multilateral non-self-executing treaty which does not allow for any reservations, and certain legal obligations can supersede historically established constitutional tenets. Each state had to create an amalgam of domestic criminal law, due process and procedure, and merge it with an internationally negotiated treaty full of political compromise and customary international law.

The United States can assume that many of the issues that arose during the legislative implementation processes of the various states would translate in some form or other into issues which might arise, were the United States to attempt to implement the Rome Statute. Ancillary to this exercise is the

158. See France Const., *supra* note 143.

159. Barrat, *supra* note 146, at 4.

knowledge of what issues have raised concern amongst the states about the Rome Statute and their inclusion in the ICC regime. Gleaning this insight is both beneficial and time-saving for Congress. The major issues, with which all or most of the states had to grapple, were:

- 1) Whether to use previously legislated attempts of ICC crimes or to utilize the language provided by the Rome Statute due to the possibility of not fully implementing the Rome Statute;
- 2) How to reconcile a state's granting of immunity for the leading political decision makers and Article 27 of the Rome Statute, Irrelevance of Official Capacity;
- 3) Whether to implement retrospective jurisdiction to the ICC crimes;
- 4) Whether to apply universal jurisdiction to the ICC crimes; and
- 5) The extent to which the domestic courts of each country would be able to effectively and successfully prosecute those accused of ICC crimes.

What all states had in common was a cognizance of not fully implementing the Rome Statute resulting in their inability to take advantage of complementarity jurisdiction and thus exposing themselves unnecessarily to ICC jurisdiction. Articles 17(1) and 18 of the Rome Statute are the jurisdictional linchpins of the Rome Statute and, accordingly, they should also be the main focus for the United States, regardless of whether the United States decides to ratify the statute and become a signatory member state.¹⁶⁰

Article 18 is the general roadmap for admissibility and complementarity.¹⁶¹ Article 18 defines the steps that are required for both the prosecutor and the state when a situation has been deemed reasonable to investigate.¹⁶² Article 17(1) lays out a test for which, if met, states can guarantee primacy on a case by case basis within the ICC jurisdiction.¹⁶³ In effect, the two Articles make the ICC a court of last resort. Only if a state is shown to be unwilling or unable to genuinely investigate or prosecute a case can the ICC acquire primary jurisdiction.

To assure primacy of United States jurisdiction over ICC crimes and effectively eliminate the ICC's ability to prosecute persons from the United States, the United States would have to create legislation to close the gaps in

160. Rome Statute, *supra* note 2, art. 17(1), 18.

161. *Id.* art. 18.

162. Rome Statute, *supra* note 2, art. 18(1) (The meaning of "state" here is meant as the state that would normally exercise jurisdiction over the crimes concerned, as it is used in Article 18(1) of the Rome Statute.).

163. *Id.* art. 17(1).

title 18 of the United States Code. This would presumably protect United States' interests by securing its ability to prosecute all persons including United States' nationals who have allegedly committed certain ICC crimes overseas where United States federal jurisdiction is currently absent.¹⁶⁴

In accordance with Article 18 procedures, were the prosecutor to decide to continue with an investigation or prosecution after having deferred to the state, the prosecutor would have to bring the issue before the pre-trial chambers of the ICC to remove the case from the state's jurisdiction.¹⁶⁵ By closing the jurisdictional gaps in the United States criminal code, and if the ICC Prosecutor were motivated by anti-American propagandizing, as the United States has argued is a possibility, it is reasonable to suppose that the pre-trial chamber would be unsympathetic to the prosecutor's concerns were the United States to have in place domestic legislation that left no room for doubt.

The purpose of the ICC is not to try individual and isolated crimes, as discussed above, but as the preamble to the Rome Statute states, its focus is on the adjudication of such grave criminal acts that threaten the peace, security, and well-being of the world, and to end the impunity for the perpetrators of grave crimes.¹⁶⁶ As the United States continues with the "war on terror," the ICC is poised to focus the global spotlight of truth and justice on the perpetrators of human calamity.

Regardless of whether the ICC will prove to be the premier venue for the prosecution of terrorists worldwide, the incorporation of the ICC crimes into United States law would be an adept tool for the prosecution of terror suspects in United States courts. The ability to reach globally, to all nationalities, to extradite according to law, would serve as a moral victory for the United States and the rule of law. The termination of global impunity for terrorists that escape justice by hiding behind the protections of state-sponsors of terrorism is one of the rationales put forward by the current United States Administration for the invasion of Iraq.

The systematic attacks perpetrated against the United States on September 11, 2001, would have been within the ICC's jurisdiction, had the ICC existed at the time. Difficulties in obtaining personal jurisdiction of suspected terrorists have proven on occasion to be an insurmountable hurdle for the international administration of justice, as evidenced by the Lockerbie suspects.¹⁶⁷ Since it

164. CASSEL, *supra* note 1, at 436-38. (discussing the United States' difficulty in prosecuting international perpetrators of genocide, such as Pol Pot and Saddam Hussein's Lieutenants in federal court due to the lack of federal jurisdiction for the crimes they had allegedly committed).

165. Rome Statute, *supra* note 2, art. 18.

166. *Id.* pmb1.

167. See generally Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, INTERNATIONAL LAWYER (2000).

appears as if the “war on terror” will continue for the foreseeable future, empowering the United States to advantageously utilize the rule of law to bring suspects to justice should be given serious consideration. It may even revitalize the international perception of current United States foreign policy.

Although the United States during the Clinton Administration may have touted the necessity and desire to establish a permanent international criminal court,¹⁶⁸ it would appear that the United States is the single largest impediment to the legitimacy of the ICC.¹⁶⁹ Even though the United States actively participated and even took a leading role in the negotiation of the Rome Statute, the United States stands almost alone in its rejection of the ICC.¹⁷⁰ Since the Rome Statute was finalized at the end of the 1998 conference, the United States has attempted to redress issues which Ambassador David Scheffer, the United States lead negotiator at Rome, called “fundamental flaws in the Rome Treaty.”¹⁷¹ The United States has also legislated policy to undermine the ICC.¹⁷² Presently, there are no prospects that the United States will sign, re-sign, or ratify the existing text in the future.¹⁷³ Reflective of the current administration’s policy on the ICC, Congressman Vito Fossella (R-NY, 13th District) warned that the establishment of the ICC to prosecute war crimes could be used by

168. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE, THE TWENTIETH CENTURY EXPERIENCE 188 (1999); David Scheffer, *The United States and the ICC*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 203 (Dinah Shelton ed., 2000); see also President’s Remarks Honoring Genocide Survivors in Kigali, Rwanda, 34 WEEKLY COMP. PRES. DOC. 13 (Mar. 30, 1998); see also STERLING JOHNSON, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OR INTERNATIONAL CRIMINAL LAW? 1 (2003).

169. Bassiouni, *supra* note 7 (stating that the greatest source of uncertainty for the ICC is the current United States position); BALL, *supra* note 168, at 188.

170. See Rome Statute, *supra* note 2; see SIGNATURES & RATIFICATIONS, *supra* note 14 (There are 98 countries that have currently ratified the Rome Statute.); other countries that voted to reject the Rome Statute were Israel, Iraq, Qatar, China, Libya, and Yemen. Human Rights Watch, *The United States and the International Criminal Court*, <http://www.hrw.org/campaigns/icc/us.htm> (last visited Oct. 3, 2005).

171. See USUN Press Release, David J. Scheffer, Statement on “The International Criminal Court” (Oct. 21, 1998), available at http://www.un.int/usa/98_179.htm.

172. See Article 98 Agreements, *supra* note 69 (legislation undermining the ICC); see ‘American Servicemembers’ Protection Act of 2001, 107th Cong. § 857 (2001) [hereinafter ASPA]; *U.S. Threatens to Cut Aid to Countries That Support the ICC*, HUMAN RIGHTS FIRST, Dec. 7, 2004, http://www.humanrightsfirst.org/media/2004_alerts/ij_1207_icc.htm (threats to withhold financial payments to countries who support the ICC).

173. David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 121 (1999) (“Having considered the matter with great care, the United States will not sign the treaty in its present form.”).

terrorist nations and enemies of the United States to thwart the war on terrorism.¹⁷⁴

The importance of United States participation in the process is exemplified by the leading role it had during the Preparatory Commission.¹⁷⁵ Subsequent review conferences will remain the places where the United States can participate and influence the future development of the court. By making the political decision to not participate in the ICC, the United States voluntarily relinquishes its ability to directly influence the court as it matures. The United States, for example, will not be able to participate in the important decisions regarding proposing judicial candidates, the ICC Prosecutor, or general court staffing.¹⁷⁶

Also, the United States may not have a presence as an observer in the Assembly of State Parties in 2009, when, supposedly, the signatory states are to attempt a working definition of the crime of aggression.¹⁷⁷ However, as an original signatory state, the United States has the right to attend.¹⁷⁸ Since the Bush Administration took office in 2001, it has sent two delegations to the Preparatory Commission Sessions.¹⁷⁹ Even though the Bush Administration's delegations declared that the United States did not support the ICC and did not participate in the plenary sessions, they did participate in the working groups on financing of the ICC and the definition of the crime of aggression.¹⁸⁰ There is simply too much at stake.

Specifically, the United States would not be able to voice its concern regarding the definition of the crime in which the United States might find itself most exposed and little, if any, influence would have been exercised in its formation. Although some, with greater insight, feel that the crime of aggression will not be defined in the foreseeable future.¹⁸¹ The foregoing of any significant influence over the eventual definition of the crime of aggression may prove to be ultimately rather unfortunate as it could either create an unbridgeable chasm between the United States and the ICC or it quite possibly could spell the eventual demise of the ICC.

174. Congressman Vito J. Fossella, *Fossella Warns Int'l Criminal Court Could Hinder America's War on Terrorism*, July 12, 2002, <http://www.house.gov/fossella/Press/pr020712.htm>.

175. See Scheffer, *supra* note 10, at 98.

176. John Washburn, *The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 *FORDHAM INT'L L.J.* 873, 880 (2002).

177. Rome Statute, *supra* note 2, art. 112 (describing the makeup and role of the Assembly of State Parties within the International Criminal Court).

178. *Id.*

179. *Id.*

180. *Id.*

181. See Bassiouni, *supra* note 7.

Were the United States to reverse its current disengagement from the ICC, there appears to be no internationally recognized requirement or procedure to repudiate the Bolton letter of May 6, 2002, from the United Nations (U.N.).¹⁸² According to the U.N. Under-Secretary for Legal Affairs, never before has a state unsigned a U.N. treaty.¹⁸³ Consequently, the procedures for withdrawal of the document, if even necessary, are equally unexplored, specifically regarding the legal significance of such a repudiation.

The Bolton letter was merely to notify the U.N. Secretary-General of the United States intent to not become a party to the Rome Statute, a requirement under the Vienna Convention on the Law of Treaties.¹⁸⁴ Per Article 18 of the Vienna Convention on the Law of Treaties, once a state has signed a treaty it is barred from acts which would defeat the object and purpose of the treaty.¹⁸⁵ The United States passed the American Servicemembers' Protection Act (ASPA) two months later, in late July, 2002.¹⁸⁶

Simply renouncing the Bolton letter by diplomatic communiqué to the Secretary General, total disengagement by the United States would ostensibly terminate. Communicating United States intent to the U.N. is important because, without doing so, any United States legislation closing the gaps in title

182. Letter from John R. Bolton, Under Secretary of State for Arms Control, to General Kofi Annan, U.N. Secretary-General (May 6, 2002), *available at* <http://www.amicc.org/docs/bolton.pdf> (This letter was the official communication from the United States government which informed the Secretary General of the U.N. that the United States did not intend to become a party to the Rome Statute, and stated that the United States has no legal obligations arising from President Clinton's signature on December 31, 2000.) [hereinafter Bolton Letter].

183. Press Release, World Federalist Association, Bush Official Hints at "Unsigned" of Rome Statute (Mar. 28, 2002) (quoting U.N. Under-Secretary for Legal Affairs).

184. This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.
Bolton Letter, *supra* note 182.

185. Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Vienna Convention, *supra* note 12, art. 18.

186. See ASPA, *supra* note 172; see *Chronology of ICC-Related Legislation*, WASHINGTON WORKING GROUP ON THE ICC (May, 2001), *available at* <http://www.iccnw.org/documents/otherissues/aspa/presswiccaspa200208.doc>.

18 would not allow the United States to be “willing” to genuinely investigate or prosecute, now that the United States was “able” to do so. Also, by renouncing the Bolton letter, the ICC pre-trial chambers would be less sympathetic to *proprio motu* requests by the prosecutor to remove the case from United States jurisdiction.

B. United States’ Fears

The trepidation that the United States has expressed regarding the ICC was best articulated by the United States contingent at Rome,¹⁸⁷ then rehearsed by the Bush Administration sometime subsequent. It appears to center around the fear of the United States losing its sovereign decision-making power¹⁸⁸ over its citizenry and national interests,¹⁸⁹ even when acting strictly within the U.N. authorized confines of a peacekeeping mission.¹⁹⁰ While the United States currently maintains that it does not recognize any obligations under the Rome Statute,¹⁹¹ remarkably, the United States is questionably more exposed as a non-signatory state than a state who has signed the treaty.¹⁹² Additionally, questions concerning sovereign integrity of non-party states to the Rome Statute arose with U.N. Security Council Resolution 1593 of March 31, 2005, granting the ICC Prosecutor “Chapter VII” authority to begin an investigation of the alleged atrocities perpetrated in Sudan.¹⁹³

These are powerful and valid arguments and are not to be easily discarded by those who merely disagree with the United States foreign policy or its negotiating strategy in Rome. The validity of these arguments must not only be discussed by the international community. They must be met with a political response that re-engages the United States into the ICC fold and the international community as a whole. Without dialogue and a resolution, the ICC will marginally exist at its own peril. Even if the United States Administration continues its current policy of actively working to isolate itself from the ICC, the United States should nonetheless prepare its federal criminal code in an attempt to minimize, if not fully eliminate, its exposure and create the requisite political and legal environment to protect its national interests and assure United

187. BALL, *supra* note 168, at 191.

188. Scheffer, *supra* note 173, at 15; BALL, *supra* note 168, at 201.

189. BALL, *supra* note 168, at 191; Thomas Omestad, *The Brief for a World Court: a Permanent War-Crimes Tribunal Is Coming, but Will it Have Teeth?*, U.S. NEWS & WORLD REPORT, Oct. 6, 1997, at 52.

190. BALL, *supra* note 168, at 192.

191. Bolton Letter, *supra* note 182 (The United States has no legal obligations arising from President Clinton’s signature on December 31, 2000.).

192. William K. Lietzau, *International Criminal Law after Rome: Concerns from a United States Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 131 (2001).

193. S.C. Res. 1593, U.N. Doc. S/RES/1593 (March 31, 2005).

States primacy over all potential ICC actions involving those United States interests.

A possible scenario could develop as follows: the United States President gives the approval to bomb what intelligence sources have indicated is a building housing belligerents, when in fact it is later proven to have been a hospital and innocent civilians are killed. An NGO, or the state where the bombing took place, or a state of nationality of a victim (if they are members of the ICC regime) informs the ICC Prosecutor of the incident. Before the ICC Prosecutor can initiate an investigation, he must inform all relevant parties of the incident. By calling on the states concerned, complementarity mandates that the United States have the option to take control of the investigation in accordance with Articles 17 and 18 of the Rome Statute.

For the United States to comply with Articles 17 and 18 of the Rome Statute¹⁹⁴ and assume primacy over the investigation and possible adjudication of American citizens accused of an ICC crime, the United States would have to be able to both investigate and prosecute the alleged crime. Currently, the United States does not have the legal framework in place to strictly comply with all the demands of Articles 17 and 18 of the Rome Statute, as gaps exist in the United States criminal code regarding certain ICC crimes.¹⁹⁵ The United States would have to initiate a *bona fide* investigation within six months and prove to the ICC Prosecutor that the investigation, if needed, was able to trace up the line of command, possibly up to the Chief Executive level.¹⁹⁶ The Rome Statute does not recognize immunity for heads of state from prosecution.¹⁹⁷ The fear of an international judicial organ mandating an investigation and the mere possibility of prosecuting the President of the United States for decisions made in his official capacity is real. It may prove to be one of the political hurdles that the United States is incapable of clearing.

The United States could argue that having to initiate an investigation of the President at the behest of an international body is a loss of sovereignty. Were the ICC Prosecutor not satisfied with the United States capability to prosecute a suspect, the ICC Prosecutor could forward a request to the pre-trial chambers of the ICC and ask for the judge's approval to handle both the investigation and

194. Rome Statute, *supra* note 2, arts. 17, 18.

195. *Id.*; Crimes and Criminal Procedure, 18 U.S.C. §§ 1091, 2441, 1111 (2000); CASSEL, *supra* note 1, at 436.

196. CASSEL, *supra* note 1, at 436.

197. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Rome Statute, *supra* note 2, art. 27(1).

possible subsequent prosecution of United States personnel involved in the bombing of the hospital.

Failing in the Article 18 arguments, the prosecutor may then look to Article 17(1) for jurisdiction, which is a case by case jurisdictional test. Article 17(1) of the Rome Statute states, "the court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is *unwilling or unable* genuinely to carry out the investigation or prosecution. . . ."¹⁹⁸ If the United States does not have the requisite criminal statutes to satisfy Article 17(1), then in fact the United States is *ipso facto* "unable" to prosecute.¹⁹⁹ Were the United States to have the requisite laws on the books, then the only question would be whether the United States is "unwilling" to investigate or prosecute. This is a fundamentally different question since every state must face this test, regardless of the breadth of their implementing legislation.

Another major reservation that the United States seems to have with the ICC is the fear that United States civilian and military persons would be prosecuted for Article 5 crimes by rogue and politically motivated states, the ICC Prosecutor, or the ICC Judges due to the possibility of anti-American propagandizing.²⁰⁰ There is also very little in the Rome Statute that recognizes the unique circumstances of the United States military such that the United States has "reluctantly had to conclude that the treaty, in its present form, contains flaws that render it unacceptable."²⁰¹ The ICC only focuses on the extremely heinous crimes, as they are defined in Articles 5 through 8, that are crimes in which the United States government arguably does not engage.²⁰² The United States has been a world leader in establishing *ad hoc* tribunals and bringing the need for adjudication of international criminals to the forefront in war stricken parts of the world like Rwanda, Sierra Leone, the Balkans,²⁰³ and most recently in Cambodia, where direct legislative attention is focused on ending impunity for the surviving Khmer Rouge officials.²⁰⁴

198. *Id.* art. 17(1) (emphasis added).

199. *Id.*

200. BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 165 (2003).

201. Rome Statute, *supra* note 2; BALL, *supra* note 168, at 201 (quoting Ambassador David J. Scheffer who said, "On the practical side, no other nation matches the extent of the United States overseas military commitments through alliances and special missions such as current peacekeeping commitments. . . .").

202. Rome Statute, *supra* note 2, arts. 5–8.

203. David J. Scheffer, *P-I Focus: U. S. Sabotages International Court at Its Own Peril*, THE SEATTLE POST-INTELLIGENCER, Feb. 1, 2004, http://seattlepi.nwsource.com/opinion/158282_focus01.html.

204. See Ker Munthit, *Khmer Rouge Bosses Could Face Trials Soon*, THE GLOBE AND MAIL (Can.), Oct. 6, 2004.

Accompanying the United States Administration's disassociation from the ICC, the United States Congress took a significant step to codify the political disengagement, the purposes of which can be viewed as a precursor to continued negotiations regarding United States involvement in the ICC regime. The ASPA was signed into law in August, 2002, by President Bush in order "to protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not a party."²⁰⁵ But for the Dodd Amendment inserted into the bill which eventually became Public Law 107-206, as a second degree amendment, the disassociation would have been a complete rupture.²⁰⁶

The United States has legislated attempts to not only insulate itself from the reach of the ICC, but also to penalize those states who do ratify the Rome Statute as evidenced in the recent international debate regarding the "Article 98 Agreements" which grants a waiver and allows states to disregard their obligation to cooperate with the ICC regarding the surrender of persons wanted by the ICC if it were to require the states to act inconsistently with their obligations under international law and agreements.²⁰⁷

IV. COMPARISON

A. What the United States Can Learn From the Different Approaches

As discussed briefly above, the United States had legislated some of the ICC crimes prior to the existence of the ICC.²⁰⁸ It would not be advisable, however, for the United States to consider those statutes as substitutes for the Rome Statute Articles 5 through 8 for a few reasons. First and most significantly, current federal jurisdiction regarding war crimes and genocide has significant jurisdictional gaps which do not allow for their prosecution in certain cases.

Other democracies wrestled with the possibility of using preexisting legislation as substitutes for the Rome Statute language, in part, due to the familiarity that their courts and lawyers had with the former legislation. Ultimately, the states came to the realization that to fully assure ratification of the Rome Statute, their codes had to be updated. It was in their best interests to do so.

205. See ASPA, *supra* note 172.

206. Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002).

207. Rome Statute, *supra* note 2, art. 98.

208. 18 U.S.C. §§ 1091, 2441 (these sections are respectively the United States federal crimes of genocide and war crimes).

Germany, for example, wrestled with using new language and ultimately decided to not only update the old terminology with language from the Rome Statute, but to broaden the scope of the implementing legislation by including language from its international treaty obligations, which were not included in the Rome Statute, arising from the Geneva Convention and Optional Protocols. While the German technique is first-rate, there was no technical reason to include the Optional Protocols to the Geneva Convention. The legal obligations arising from ratified international treaties are binding nonetheless.

The United States will have to address Article 27 of the Rome Statute, "Irrelevance of Official Capacity," in the near future regardless of whether the United States wishes to ratify the Rome Statute.²⁰⁹ The fact that tests in Articles 17 and 18 require a state to be *able and willing* to genuinely investigate may require an investigation of governmental officials (emphasis added).²¹⁰ This apparently cannot be avoided for state parties to the Rome Statute. The United States can rely on the state of customary international law were the United States to remain a non-state party to the ICC, as the ICJ in *Congo v Belgium* drew a road map for head of state immunity.²¹¹ All state parties to the Rome Statute have acquiesced to the abrogation of immunity for ICC crimes. A government official may retain his or her immunity for domestic criminal proceedings, but the domestic immunity will be ignored for ICC purposes. The French example is on point. The French added a phrase to their constitution recognizing the jurisdiction of the ICC according to the Rome Statute. The constitutional amendment continues to provide domestic immunity for French politicians acting in their official capacity from domestic criminal prosecutions but does not shield the same persons from the ICC's jurisdiction. However, non-state parties to the Rome Statute must rely on customary international law.

With regard to non-state parties to the Rome Statute, under customary international law, the ICJ held in *Congo v Belgium* that there are four exceptions to an incumbent head of state's absolute immunity:

- 1) A head of state is not immune from process in his or her home country;
- 2) The home country has the option to waive the head of state immunity in foreign jurisdictions;
- 3) There is no immunity for acts committed either before or after the period that the head of state is in office, and there is no immunity for international crimes committed while in office which are committed in his or her private capacity; and

209. Rome Statute, *supra* note 2, art. 27.

210. *Id.* arts. 17, 18.

211. Democratic Republic of the Congo v. Belgium, Feb. 14, 2002, 41 I.L.M. 536, 551-52.

- 4) No immunity exists when an international court has proper jurisdiction.²¹²

The Rome Statute emboldens the argument that incumbent head of state immunity was eroding under customary international law.²¹³ Falling squarely into the fourth exception to head of state immunity, the ICC relies on the state party's proper abrogation of head of state immunity under the Rome Statute for jurisdiction. However, heads of states of both state parties and non-state parties to the Rome Statute apparently must conform their actions committed in their private capacity as there is no immunity under customary international law for atrocity crimes. There is no defensible rationale for granting impunity for incumbent heads of state from atrocity crimes because the heinous nature of such crimes cannot fall within the justifiable requirements of the office. Generally, it appears that actions not committed in a private capacity by a non-state party's incumbent head of state retains immunity under customary international law while a state party's incumbent head of state does not in accordance with Article 27 of the Rome Statute.

The United States will have to examine at a later date whether to include retrospective and universal jurisdictions to any legislation that Congress would propose to close the gaps in title 18 of the United States Code. The purpose, as stated above, would be to assure United States jurisdictional primacy and meet the tests in Articles 17 and 18 of the Rome Statute. The broader the scope of any proposed legislation would be to provide more weight to the United States argument of having initially met the jurisdictional tests (a good faith investigation or prosecution would subsequently have to occur). If the United States were to apply retrospection, an examination of past United States policies may have to occur prior to any enactment of retrospective jurisdiction. Australia, for example, decided not to utilize the tool of retrospection due to its government's historical policies of dealing unjustly with the indigenous populations.

True universal jurisdiction, on the other hand, may not serve the best interests of the United States. Even though universal jurisdiction for a crime does not mean that it can be prosecuted in any court in all circumstances,²¹⁴ and ICC jurisdiction is based on the consent of the state parties where the crime occurred or the nationality of the accused,²¹⁵ the United States should fashion

212. *Id.*; see also Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L. J. 651, 665 (2002).

213. Rome Statute, *supra* note 2; Tunks, *supra* note 212, at 660.

214. David J. Scheffer, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 233 (2001).

215. *Id.* at 238.

its jurisdictional boundaries for ICC crimes in any proposed legislation within these limiting parameters. By mirroring the ICC's own outer limits to its jurisdiction, the United States does not have to open itself up to be the world's court for ICC crimes. The United States would be protecting its sovereign interests by meticulously crafting its jurisdiction over ICC crimes to enable the United States to assure primacy over any case that the ICC could have an interest as it pertained to United States nationals, property, and interests.²¹⁶

By defining the United States jurisdiction as that equaling the ICC's jurisdiction over any case in which the United States may have an interest, it would allay doubt regarding the United States' capability to prosecute the suspect. Germany decided on very broad universal jurisdiction for the crime of genocide and, as a result, had to counterbalance the universality for the crime of genocide with broad prosecutorial discretion in order to assuage the fear of having the German courts clogged with suits from around the world in search of a judicial forum. The United Kingdom applied jurisdiction to any United Kingdom national, resident, or person who is subject to United Kingdom service of process. The United Kingdom, Australia, and Canada all require a signature from the Attorney General to move forward. Broadening the jurisdiction of the United States federal courts to be able to prosecute all the ICC crimes is a powerful tool for the United States regardless of whether the United States ratifies the Rome Statute.

B. *United States' Gaps*

Title 18 of the United States Code, for example, does not codify crimes against humanity as such.²¹⁷ A domestic federal charge of murder may theoretically be analogous to the crime against humanity of murder, but may not technically suffice to assure United States primacy over an ICC indictment. The elements of the two crimes, Article 7(1)(a) of the Rome Statute and domestic murder, 18 U.S.C. 1111(a), are arguably too divergent to satisfy the ICC's complementarity jurisdiction.²¹⁸ Furthermore, domestic murder does not express the gravity of the alleged crime.²¹⁹

216. *Id.* Incorporating the four kinds of jurisdiction possible:

- 1) territorial,
- 2) nationality or personality,
- 3) passive personality, and
- 4) protective or effects.

217. See 18 U.S.C. §§ 1091, 2441, 1111.

218. Rome Statute, *supra* note 2, § 7(1)(a); 18 U.S.C. § 1111(a).

219. Rome Statute, *supra* note 2, *pmb.* (the high threshold of an ICC crime, as the Preamble of the Rome Statute notes, *inter alia*, that such grave crimes threaten the peace, security and well-being of the world).

Article 7(1)(a) of the Rome Statute deems murder to be a crime against humanity if certain circumstances are met.²²⁰ The Elements of Crimes further defines the crime against humanity of murder to contain an element of a “widespread or systematic” attack as part of the killing of a human being, and the perpetrator had to have knowledge that the conduct was part of, or intended the conduct to be part of, a “widespread or systematic” attack against a civilian population.²²¹ A simple murder does not constitute a crime against humanity.

The federal murder statute, 18 U.S.C. 1111(a), states that, “murder is the unlawful killing of a human being with malice aforethought.”²²² The federal charge allows for there to be multiple charges of murder, if applicable.²²³ Yet, there is no inference or requirement of a “systematic or widespread” attack in the federal charge.²²⁴ To put it simply, the only commonality between the two charges is the word murder. The federal charge would technically apply to a perpetrator of the crime against humanity of murder, but there still remain three crucial questions which require debate. Those are: 1) whether the federal charge of murder would suffice to fulfill Articles 17 and 18 of the Rome Statute and give the United States primacy over ICC jurisdiction; 2) would federal courts have jurisdiction over the perpetrator, federal courts currently have jurisdiction only over crimes against humanity committed overseas if they involve torture, attempted torture, or certain types of international terrorism;²²⁵ and 3) whether the federal charge of murder demonstrates, with sufficient magnitude, the heinous nature of the crime to the international community so that it rises to the high threshold which the Rome Statute requires.

This is but one example of a single crime in the Rome Statute. There are many that require a similar examination. With the current United States Administration’s aspiration to disassociate from the ICC in any fashion, whether the federal charge of murder is sufficient to guarantee primacy over an ICC

220. Rome Statute, *supra* note 2, art. 7(1)(a).

221. See ELEMENTS OF CRIMES, *supra* note 81.

222. There can be little doubt that murder in the second degree would not rise to the level of a crime against humanity because:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

18 U.S.C. § 1111(a).

223. *Id.*

224. *Id.*

225. CASSEL, *supra* note 1, at 429.

indictment should ring alarm bells on Capitol Hill. The fundamental question of whether the federal courts even have jurisdiction over such heinous crimes should also be the cause of a certain amount of apprehension in Congress. Regardless of whether the current United States Administration is politically inclined to participate in the ICC regime or subsequent decisions prove the current federal law to be (or not to be) sufficient, incorporating analogues to the Rome Statute Articles 5 through 8 into federal law would have a single and profound effect. It would assure primacy of United States jurisdiction over any crime in which the ICC could have an interest. Even passing legislation that mirrors Articles 5 through 8 of the Rome Statute would not technically incorporate the United States into the ICC regime. It would simply protect against the fears currently propagated by the United States.

The current federal genocide statute allows the federal courts to have jurisdiction only when the crime is committed in the United States or by a United States national.²²⁶ For war crimes, United States federal jurisdiction is also not without its gaps. Only when the victim or the perpetrator is a United States national or member of the United States military do United States courts have jurisdiction.²²⁷ Other states parties to the Rome Statute dealt with the jurisdictional gaps of their own by expanding the reach of their domestic jurisdiction. The expansiveness depended on the established legal norms and what the law would permit.

Whether the federal murder statute properly reflects the heinous nature of the crime against humanity of murder is debatable. There are persuasive arguments that the penalties for murder are similar in their gravity, if not more so, in the United States since the United States can impose the death penalty. Therefore, if the criminal justice system's punishment is retributive in nature, there is parity. Since the federal murder statute can be used to charge multiple murders, a suspected criminal can be dealt with accordingly.

More persuasive, however, are the arguments that the federal murder statute does not properly reflect the magnitude of the crime against humanity of murder since the *mens rea* elements are distinct. In the federal statute:

"Malice aforethought" is the characteristic mark of all murder, as distinguished from the lesser crime of manslaughter which lacks it. It does not mean simply hatred or particular ill-will, but extends to and embraces generally the state of mind with which one commits a wrongful act. It may be discoverable in a specific deliberate intent to kill. It is not synonymous with premeditation, however, but may also be inferred from circumstances that show a wanton and depraved

226. 18 U.S.C. § 1091; CASSEL, *supra* note 1, at 429–30.

227. 18 U.S.C. § 2441.

spirit, a mind bent on evil mischief without regard to its consequences.²²⁸

Article 7(1)(a) of the Elements of Crimes states that the *mens rea* element is a subjective one and cannot be inferred as the federal statute allows.²²⁹ The perpetrator must *know* that the killing of a person was part of a widespread or systematic attack directed against a civilian population and, therefore, the knowledge requirement is premeditated murder as part of a grand scheme.²³⁰ One cannot know that he/she is going to kill a person as part of a widespread or systematic attack if one does not already know that he/she is going to kill.²³¹ The knowledge and preparation of killing as part of a widespread or systematic attack is arguably premeditation.²³² Not knowing exactly who it is that you are going to kill is irrelevant.²³³ Malice aforethought is not synonymous with premeditation, however, even if the killing were premeditated, because under the federal statute there is no requirement of a grand scheme of a widespread or systematic attack.²³⁴

There are three requirements for the crime against humanity of murder.²³⁵ They are 1) killing; 2) with knowledge (premeditation); and 3) as a part of a widespread or systematic attack on the civilian population.²³⁶ The federal murder statute has only two criteria: a killing, with malice aforethought.²³⁷ The heinous nature of the ICC crime is manifested in the widespread or systematic attack on the civilian population. For the reasons stated above, the federal statute does not arguably rise to the level of "such grave crimes [that] threaten the peace, security, and well-being of the world"²³⁸ without there being a reference to a widespread or systematic plan to kill civilians.

Also, if the purpose of the imprisonment for a crime is rehabilitative in nature, then the implementation of the death penalty by the United States for premeditated murder (and the United States argument that the federal murder statute reflects the heinous nature of the crime against humanity of murder)

228. *Gov. of the Virgin Islands v. Lake*, 362 F.2d 770, 774 (1966) (defining malice aforethought).

229. *ELEMENTS OF CRIMES*, *supra* note 81, art. 7(1)(a).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *ELEMENTS OF CRIMES*, *supra* note 81, art. 7(1)(a).

235. *Rome Statute*, *supra* note 2, art. 7(1).

236. *Id.*

237. 18 U.S.C. § 1111(a).

238. *Rome Statute*, *supra* note 2, pmbl.

arguably falls short, as no rehabilitation can occur when the convicted person's sentence is consummated.

Proposed legislation to close the United States' gaps should address these essential concerns. Below are the beginnings of proposed legislation that would close the gaps in title 18. The difficulties in providing a launching pad for proposed legislation is considering the political desire to officially recognize the ICC. It would be simple and effective to codify the ICC crimes by reference to Articles 5 through 8 of the Rome Statute and provide for United States federal jurisdiction accordingly, as many states did in their implementing legislation. The United States scenario is distinct due to political concerns. Therefore, in the proposed additions to the current analogues, no reference to the Rome Statute is made. A reference to the ICC is used to broaden federal personal jurisdiction with a consent requirement of the Attorney-General.

There is no codified federal analogue for Article 7, "Crimes Against Humanity."²³⁹ Two solutions are possible, however. The first solution is where there is a federal crime similar to those included in Article 7 of the Rome Statute, elements must be included to encompass the requirements of a "widespread or systematic attack directed against any civilian population," the jurisdictional elements of each crime must be broadened to the extent that the ICC may have jurisdiction, and any additional elements of the crime itself should be comparatively examined with the ICC Elements of Crimes requirements. Where there is no federal analogue, for example, the crime of apartheid, a new crime must be fashioned. The second solution is to draft proposed legislation that mirrors the crimes in both the Rome Statute and the ICC Elements of Crimes for crimes against humanity.

1. Genocide

With regard to the jurisdictional limitations of federal courts and the crime of genocide, a broadening of the federal genocide statute, 18 U.S.C. §1091, must occur. Additional elements should be added to subsection (d) of §1091, which aligns federal jurisdiction with that of the ICC and the definitional section, §1093. This can be accomplished by simply adding the Attorney General's consent to additional jurisdictional concerns.

- (d) REQUIRED CIRCUMSTANCE FOR OFFENCES.—
The circumstance referred to in subsections (a)
and (c) is that—
1) the offence is committed within the United
States; or

239. *Id.* art. 7.

- 2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
- Additional section → 3) at the specific direction of the Attorney-General where the offence is committed outside the United States by any person; and
- Additional section → 4) jurisdiction over the offence by the International Criminal Court may occur.

Additionally, 18 USC §1093, the definitional section of the federal genocide statute should be amended to include a definition of the ICC.

(9) The term “International Criminal Court” means the court constituted by the Rome Statute of 1998.

2. Crimes Against Humanity

There is no federal statute codifying crimes against humanity as such. The United States has codified various crimes which may (or may not) suffice for securing United States complementarity jurisdiction, for example, the federal murder statute (18 U.S.C. §1111), discussed above, the federal torture statute (18 U.S.C. §2340A), kidnapping (18 U.S.C. §1201), hostage taking (18 U.S.C. §1203), sexual abuse (18 USC 2241-2245), etc.

A vastly more encompassing statute may be required, as is proposed below.

18 U.S.C. §X001—Crimes Against Humanity

(a) Offences.—

- (1) In General.—notwithstanding any other section of this title, it shall be an offence if anyone commits a crime against humanity if—
 - (A) as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, and
 - (B) the Attorney-General expressly approves; and
 - (C) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur; and
 - (D) commits an offence in (c).

- (b) Jurisdiction.—There is jurisdiction over the offences in subsection (a) if—
 - (1) the offence takes place in the United States and—
 - (A) the Attorney-General expressly approves; and
 - (B) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur.
 - (2) the offence takes place outside the United States and—
 - (A) the Attorney-General expressly approves; and
 - (B) jurisdiction over the offence by the International Criminal Court, as defined in 18 U.S.C. 093(9), may occur.
- (c) Definitions.—As used in this section, the term—“crime against humanity” means—murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

3. War Crimes

With regard to the jurisdictional limitations of federal courts and the federal war crimes statute (18 U.S.C. §2441), recognition of other persons (both suspects and victims) is required as well as a broadening of the subject matter jurisdiction. Currently, only when the victim or the perpetrator is a United States national or member of the United States military do United States courts have jurisdiction.

- (a) Offence. however, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) Circumstances. the circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is:

- New numbering → (1) a member of the Armed Forces of the United States; or
- New numbering → (2) a national of the United States (as defined in section 101 of the Immigration and Nationality Act); or
- Additional section → (3) at the specific direction of the Attorney-General, any person.
- (c) Definition. s used in this section the term ar crime means any conduct
- (1) defined as a grave breach in any of the international convention signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
- (3) which constitutes a violation of common Article 3 of the international convention signed at Geneva, 12 August 1949, or any protocol to such convention to which the United Kingdom is a party and which deals with non-international armed conflict;
- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians; or
- Additional section → (5) over which the International Criminal Court, as defined in 18 USC 093(9), may have jurisdiction.

C. Conclusion

The United States has codified a patchwork of international crimes, some of which are contained in the Rome Statute. However, the patchwork is insufficient to confer jurisdiction to United States courts for the full range of

ICC crimes. The purpose of the United States in legislating crimes analogous to Articles 5 through 8 of the Rome Statute would be to satisfy Article 17 and 18 of the Rome Statute and supplant ICC jurisdiction, thus assuring United States primacy over all ICC investigations and prosecutions of persons accused of an ICC crime regardless of the nationality of the suspect or victim.

As this paper has examined, many states prior to ratification of the Rome Statute were in ostensibly the same situation as the United States currently finds itself. No state had established the legal framework sufficient to guarantee primacy over an ICC investigation or prosecution. Australia for the first time codified the crime of genocide during the ICC ratification process and Germany first legislated war crimes and crimes against humanity during the ICC ratification process. Canada used the ICC ratification process to revamp its criminal code which had previously codified war crimes and crimes against humanity but the Canadian courts found them too difficult to domestically prosecute. While the United States has the crime of genocide on the books, the jurisdictional limitations of the current law do not allow for prosecution of non-United States citizens who have allegedly committed genocide overseas and who may be in the United States, or if the alleged perpetrator is an American citizen.

Germany chose to legislate universal jurisdiction with few if any limitations imposed, relying on prosecutorial discretion to not overburden the courts with suits from around the world. Canada ultimately decided on universal jurisdiction but added a presence requirement, made the application of the crimes retrospective, and required the Attorney General's signature.²⁴⁰ This assures that the Canadian jurisprudential principles and constitutional limits of due process are protected. Australia also decided to apply universal jurisdiction to ICC crimes to assure its courts of jurisdiction, but decided against making the crime of genocide retrospective due to past Australian governmental policies of mistreatment of indigenous Australians. The United Kingdom broadened its extradition law so that it could extradite to a third-party state a suspect who has been accused of the crime of genocide, war crimes, or crimes against humanity.²⁴¹ The suspect can be either a United Kingdom citizen, resident, or somehow subject to United Kingdom service of process jurisdiction, and has allegedly committed any of the ICC crimes either inside or outside of the United Kingdom.²⁴²

However, many of the ICC crimes had already been codified by the United Kingdom Parliament, and the concern in London was whether the incorporation of those previously legislated crimes would suffice for ratification purposes of

240. See CAHWCA, *supra* note 20 (Canada's ratification of the ICC and its domestic legislation).

241. U.K. ICC Act, *supra* note 100, § 51(2)(b).

242. *Id.*

the Rome Statute.²⁴³ The United Kingdom decided not to assume that they would suffice, and incorporated the ICC crimes in the most efficient and unquestionable manner by referencing the Rome Statute directly.

Each state has uniquely implemented the Rome Statute. Due to the fear of historical governmental actions, constitutional hurdles, established jurisprudential norms, and political maneuvering, the Rome Statute has proven flexible enough to incorporate individual state's concerns yet still implement the most comprehensive codification of international criminal statutes to exist.

The United States can utilize the full array of approaches that the other ratifying states took to construct legislation that will close the gaps in title 18, thus protecting United States' interests without the necessity of ratifying the Rome Statute. When the political motivation emerges to do so, the ratification process would then entail few, if any, modifications of domestic law, thus expediting United States involvement in the future administration of the ICC. Even if the United States were to adamantly decide to never ratify the Rome Statute, by closing the gaps in title 18, the United States can assure primacy over any ICC investigation and prosecution, thus protecting its sovereign interests.

All the states that have ratified the Rome Statute, even those with seemingly insurmountable constitutional jurisprudence have apparently been satisfied with the principle of complementarity to resolve doubts and fears regarding violations of sovereignty. As the American perspective on the ICC becomes more and more isolationist based on fears which other western democracies have overcome, the United States will find itself more in the focus of the ICC as a non-member.

Finally, if the ICC were to promulgate judicial activism or deprive litigants of well-reasoned justice, the other state parties and democracies would cease to adhere to the ICC findings and the ICC would quickly become irrelevant and a footnote in a textbook detailing its failed attempt to administer international criminal justice. The ICC is dependent on the voluntary association of the member states. In the meantime, the United States can protect its national interests and its sovereignty by legislating the crimes contained in the Rome Statute and still remain an outsider to the ICC.

V. ANNEXES

The annexes below have been compiled for the ease of the reader to examine the various approaches the different states took to implementing the Rome Statute. The annexes below are the author's own effort at correlating the various national statutes with the Rome Statute. The German statute below of

243. See Progress Report by the U.K., *supra* note 97.

the implementing legislation is a translation and not considered an official version. Articles 6 through 8 of the Rome Statute are not reproduced in every case, as they are extensive. A simple reference to the Article in question is provided in its stead.

ANNEX 1 – CANADA

<p>Crimes Against Humanity War Crimes Act</p> <p>Section 3</p> <p>This Act is binding on Her Majesty in right of Canada or a province.</p>	<p>Rome Statute</p> <p>Article 27 Irrelevance of official capacity</p> <p>1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.</p> <p>2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.</p>
<p>Crimes Against Humanity War Crimes Act</p> <p>Section 4(1)</p> <p>4. (1) Every person is guilty of an indictable offence who commits</p> <p>(a) genocide;</p> <p>(b) a crime against humanity;</p> <p>or</p> <p>(c) a war crime.</p>	<p>Rome Statute</p> <p>Article 5</p> <p>1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:</p> <p>(a) The crime of genocide;</p> <p>(b) Crimes against humanity;</p> <p>(c) War crimes;</p> <p>(d) The crime of aggression.</p>

Crimes Against Humanity War Crimes Act

Section 4(3)

"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Section 4(3)

"genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Rome Statute

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the

Section 4(3)

“war crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article 8 War crimes

2. For the purpose of this Statute, “war crimes” means: (a) Grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

	(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) . .
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Crimes Against Humanity War Crimes Act	Rome Statute
Section 4(4)	Article 10
For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law.	Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Crimes Against Humanity War Crimes Act	Rome Statute
Section 5(1)	Article 28
A military commander commits an indictable offence if (a) the military commander (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective command and control or	In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to

effective authority and control, and as a result the person commits an offence under section 6;

(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and

(c) the military commander subsequently

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

(2) A superior commits an indictable offence if

(a) the superior

(i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or (ii) fails, after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6; (b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or

exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

is being committed by the person;
 (c) the offence relates to activities for which the superior has effective authority and control; and
 (d) the superior subsequently
 (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
 (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

Crimes Against Humanity War Crimes Act

Section 8

A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

- (a) at the time the offence is alleged to have been committed,
- (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
- (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
- (iii) the victim of the alleged offence was a Canadian citizen, or
- (iv) the victim of the alleged offence was a citizen of a state that was allied

Rome Statute

Article 11 Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

with Canada in an armed conflict; or
(b) after the time the offence is
alleged to have been committed, the
person is present in Canada.

Section 9

(1) Proceedings for an offence under
this Act alleged to have been
committed outside Canada for which
a person may be prosecuted under
this Act may, whether or not the
person is in Canada, be commenced
in any territorial division in Canada
and the person may be tried and
punished in respect of that offence in
the same manner as if the offence had
been committed in that territorial
division.

Annex 2 – Australia

ICCCA	Rome Statute
<p>268.3 Genocide by killing</p> <p>(1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator causes the death of one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.</p> <p>268.4 Genocide by causing serious bodily or mental harm</p> <p>(1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator causes serious bodily or mental harm to one or more person;</p>	<p>Article 6 Genocide</p> <p>For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

268.5 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction

(1) A person (the *perpetrator*) commits an offence if: (a) the perpetrator inflict certain conditions of life upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the conditions of life are intended to bring about the physical destruction of that group, in whole or in part.

268.6 Genocide by imposing measures intended to prevent births

(1) A person (the *perpetrator*) commits an offence if: (a) the perpetrator imposes certain measures upon one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the measures imposed are intended to prevent births within that group.

<p>268.7 Genocide by forcibly transferring children</p> <p>(1) A person (the <i>perpetrator</i>) commits an offence if: (a) the perpetrator forcibly transfers one or more persons; and (b) the person or persons belong to a particular national, ethnical, racial or religious group; and (c) the perpetrator intends to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (d) the transfer is from one group to another national, ethnical, racial or religious group; and (e) the person or persons are under the age of 18 years; and (f) the perpetrator knows that, or is reckless as to whether, the person or persons are under that age.</p>	
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Annex 3 – United Kingdom

ICC Act 2001—Part 5	Rome Statute
<p>50—Meaning of “genocide”, “crime against humanity” and “war crime”</p> <p>(1) In this Part- “genocide” means an act of genocide as defined in Article 6,</p> <p>“crime against humanity” means a crime against humanity as defined in Article 7, and</p> <p>“war crime” means a war crime as defined in Article 8.2.</p>	<p>Articles 5, 6 and 7 of Rome Statute and corresponding Articles of the Elements of Crimes.</p>

<p>(2) In interpreting and applying the provisions of those Articles the court shall take into account-</p> <p>(a) any relevant Elements of Crimes adopted in accordance with Article 9, and</p> <p>(b) until such time as Elements of Crimes are adopted under that Article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30th June 2000.</p>	
<p>ICC Act 2001—Part 5</p> <p>51—Genocide, crime against humanity and war crimes</p> <p>(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.</p> <p>(2) This section applies to acts committed-</p> <p>(a) in England or Wales, or</p> <p>(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.</p>	<p>Rome Statute</p> <p>No corresponding Article</p>
<p>ICC Act 2001</p> <p>72 extradition: exception to dual criminality rule under the 1989 Act</p> <p>(1) Section 2 of the Extradition Act 1989 (meaning of extradition crime is amended as follows.</p> <p>(2) In subsection (1)(b) (extra-territorial offences), after subparagraph (ii) add or</p>	<p>Rome Statute</p> <p>No corresponding Article</p>

<p>(iii) the condition specified in subsection (3A) below. (3) After subsection (3) insert-</p> <p>(3A) The condition mentioned in subsection (1)(b)(iii) above is that the conduct constituting the offence constitutes or, if committed in the United Kingdom would constitute-</p> <p>(a) an offence under section 51 or 58 of the International Criminal Court Act 2001 (genocide, crimes against humanity and war crimes),</p> <p>(b) an offence under section 52 or 59 of that Act (conduct ancillary to genocide etc. committed outside the jurisdiction), or</p> <p>(c) an ancillary offence, as defined in section 55 or 62 of that Act, in relation to any such offence.</p>	
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Annex 4 – Germany

Code of Crimes against International Law	Rome Statute
<p>Section 6- Genocide</p> <p>(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group</p> <ol style="list-style-type: none"> 1. kills a member of the group 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the criminal code, 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part, 4. imposes measures intended to 	<p>Article 6—Genocide</p> <p>For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ol style="list-style-type: none"> (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group;

prevent births within the group,
5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life.

Code of Crimes against International Law

Section 7 Crimes against Humanity

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction on whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made

(e) Forcibly transferring children of the group to another group.

Rome Statute

Article 7 Crimes against humanity

1. For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;

pregnant with the intent of affecting the ethnic composition of any population,

7. causes a person enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

(a) by abducting that person on behalf of or with the approval of a State or a political organization, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate or whereabouts, or

(b) by refusing, on behalf of a State or of a political organization or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,

8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,

9. Severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or

10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognized as impermissible

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute

Article 8—War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Willfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Willfully depriving a prisoner of

under general rules of international law. . .

Code of Crimes against International Law

Section 8- War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,
2. takes hostage a person who is to be protected under international humanitarian law,
3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,
4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and

war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are

lawfully present in an area to another State or another area in contravention of a general rule of international law, 7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,

8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health

(a) by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,

(b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognized medical principles and the person concerned has previously not given his or her voluntary and express consent, or

(c) by using treatment methods that are not medically recognized on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or

9. treats a person who is to be

undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging

protected under international humanitarian law in a gravely humiliating or degrading manner shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.

(3) Whoever in connection with an international armed conflict

1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,

2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,

3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the

to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a

forces of a hostile Power or

4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country shall be punished with imprisonment for not less than two years.

(4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.

(5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6, and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.

comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Convention in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Convention;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Convention and of the Protocol Additional to the Geneva Convention (Protocol I) (annexed to this Act), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;

2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;

3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defense.

Section 9—War crimes against property and other rights

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.

(2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10—War crimes against humanitarian operations and emblems

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or

2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Convention in conformity with international humanitarian law shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the

Geneva Convention, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11—War crimes consisting in the use of prohibited methods of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,

2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarized zones, or against works and installations containing dangerous forces,

3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,

4. uses a person who is to be pro-

tected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,

5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,

6. orders or threatens, as a commander, that no quarter will be given, or

7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.

(2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

(3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall

military advantage anticipated shall be punished with imprisonment for not less than three years.	
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SOSA v. ALVAREZ-MACHAIN: EXTRATERRITORIAL ABDUCTION AND THE RIGHTS OF INDIVIDUALS UNDER INTERNATIONAL LAW

*Jeffrey Loan**

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I. ABSTRACT

Although the growth of extradition treaties has assisted in the prosecution of suspects who are not present in the state seeking their prosecution, there will always be situations where extradition is not available or plausible. In such circumstances the prosecuting state may be tempted to undertake an abduction in order to facilitate the prosecution of the individual in their own jurisdiction. The objective of this paper is to examine the use of state-sponsored abductions in light of international human rights law. Although the United States Supreme Court recently held in *Sosa v. Alvarez-Machain* that an extraterritorial abduction does not violate the rights of individuals under international law, it is evident that this judgment misread the content of customary international law. Individuals have the right to be free from extraterritorial abduction and despite the Supreme Court's decision, recognition of this right is necessary to ensure that the fate of abductees is not entirely dependant upon whether states are willing to advance claims on their behalf.

II. INTRODUCTION

The issue of extraterritorial abductions is fraught with important policy and legal considerations. While there may be a pressing need to achieve justice by interrogating or prosecuting a suspect, efforts to secure custody may compromise the rights of the individual and those of the state where the individual resides (the host-state). This paper acknowledges that in the absence of consent by the host-state an extraterritorial abduction, or rendition, breaches international law by violating the sovereignty of the state. However, it is contended that an examination of the issues surrounding extraterritorial abductions is not limited to the confines of state sovereignty and it is therefore important that a human rights dimension is added to the analysis. This paper will argue that state-sponsored abductions violate an individual's right to be free from extraterritorial abduction and that this right exists independently of whether there is also a breach of a state's territorial integrity.

Such a right for individuals to be free from extraterritorial abduction was not acknowledged in the recent case of *Sosa v. Alvarez-Machain*.¹ The United States Supreme Court had to consider whether abductees could bring a civil claim under the Alien Tort Statute alleging a violation of the "law of nations."² While the Court held that Alvarez had no cause of action, the approach of the Supreme Court to customary international law regarding abductions was flawed, and the decision was substantially influenced by the current war on terrorism.

1. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).
2. 28 U.S.C. § 1350 (2000).

Although the Supreme Court's decision not to bar all future suits alleging violations of international law will be declared a victory by human rights advocates, there is a risk that the aspect of the decision relating to extraterritorial abductions may be overlooked. It is important that the Court's decision is not recognized as an accurate appraisal of customary international law and that domestic courts throughout the world endeavour to protect the rights of abductees.

Section II of this paper will outline the international law regulating extraterritorial abduction and the importance of recognizing individual rights within this state-centric analysis. Section III will discuss the decision of the Supreme Court in *Sosa v. Alvarez-Machain* and will illustrate that the Court's determination of the role of the Alien Tort Statute affected the analysis of customary international law. This decision is further criticized in section IV, which demonstrates that individuals have a customary international law right to be free from extraterritorial abduction and that the Supreme Court's examination of this norm was inadequate. This section will also demonstrate that although individuals have the right not to be abducted by states, as yet there is no corresponding international right requiring states to refrain from prosecuting those seized in violation of their rights. Finally, section v. will conclude that the Supreme Court's analysis of customary international law cannot be reconciled with state practice and will outline how the political climate and ideological predispositions could have influenced the Court's misreading of the content of customary international law.

It is only by recognizing the right of individuals to be free from extraterritorial abduction that international law will be able to protect individuals in circumstances where the host-state is complicit in the abduction or is unwilling to protest the abduction. International law has traditionally been ineffective in such situations as individuals have not been acknowledged as actors in international law and the abduction is subsequently only viewed as a violating the rights of the state. Widespread recognition of the right of individuals not to be subjected to state-sponsored abductions is therefore an important development and is consistent with the growth of international human rights law which ensures that individuals are no longer completely dependant on states to advance claims on their behalf.

III. EXTRATERRITORIAL ABDUCTION: THE TRADITIONAL FRILTIES OF INTERNATIONAL LAW

The term "extraterritorial abduction" refers to the situation when a state seeking the custody of a suspected criminal forcibly removes that individual from a foreign country in order to facilitate criminal prosecution. States are encouraged into undertaking extraterritorial measures by the fact that in many

jurisdictions the mere physical presence of a suspect is sufficient for a court to exercise jurisdiction without an inquiry into how the individual was detained.³

It is a fundamental principle of international law that states must not perform "acts of sovereignty" within the territory of another state.⁴ There is consequently widespread recognition that extraterritorial abductions breach international law by violating the sovereignty and the territorial integrity of the host-state.⁵ A breach of international law constitutes an international wrong, for which the state in question has a responsibility to remedy.⁶ For individuals who have been abducted, the key issue is whether the remedy for the breach of international law mandates that they be repatriated.

The traditional view of international law is that the rights of the individual are irrelevant to the issue of whether the abductee will be prosecuted by the abducting state or returned to the aggrieved state. Traditionally, the only aspect of extraterritorial abduction that invokes state responsibility is the violation of sovereignty, the remedy for which has typically been left to the vagaries on international diplomacy.⁷ While the host-state may demand the return of an abductee as a remedy for the violation of its sovereignty, making an individual reliant upon the initiatives taken by the host-state not only leads to inconsistency in the treatment of abductees but also unsatisfactorily relegates the importance of international human rights law. Focusing on the claim of the "injured" state ignores the possibility that an individual may possess a right under international law that has been breached independently from that of a state.

While a state may bring an international claim based on the breach of its sovereignty, the law of diplomatic protection provides a means for a state to protest the treatment of its nationals. A state may bring a claim against another

3. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 253 (2002).

4. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 295 (8th ed. 1955). See also *Case of the SS "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 1, 18–19 (June 27); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 111 (June 27).

5. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 702 (1987); OPPENHEIM, *supra* note 4; BASSIOUNI, *supra* note 3; Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 410 (1996); Stephan Wilske & Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of United States v. Alvarez-Machain*, 5 U. CHI. ROUNDTABLE 205, 240 (1998); Alberto Costi, *Problems with Current International and National Practices Concerning Extraterritorial Abductions*, 8 N.Z. ASS'N COMP. L. Y.B. 57, 61 (2002); Silvia Borelli, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation*, 16 LEIDEN J. INT'L L., 803, 805 (2003).

6. International Law Commission on the Work of its Fifty-third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 28, U.N. Doc A/56/10 (Nov. 2001) [hereinafter *Draft Articles on Responsibility of States for Internationally Wrongful Acts*]; SIR ROBERT JENNINGS & SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 501 (Longmans Publishing, London 1992).

7. Mitchell, *supra* note 5, at 437.

state based on diplomatic protection when its citizens have been unable to obtain satisfaction for injuries caused by a state's breach of international law.⁸ While such an approach minimises the failings of the international legal system to recognize the rights of an abductee, it is a misconception to view diplomatic protection as an effective means to vindicate the individual's rights. Although a precondition of diplomatic protection is that an individual is harmed by the act of a state, such an injury is viewed as an injury to the individual's state of nationality rather than to the individual.⁹ So the claim is transformed into an inter-state matter and the state is seeking redress for the injury caused to itself rather than to the individual.¹⁰ As is the case for inter-state claims based on a violation of sovereignty, an act of diplomatic protection is not a private right so individuals are entirely dependant on their national state to espouse their claim.¹¹

Recourse to diplomatic protection in cases of extraterritorial abduction has been relegated in importance due to the development of modern human rights laws. Since World War II this movement has not only facilitated a growing recognition of human rights, but also led to the acceptance that many of these rights are not simply derived from the rights of a state.¹² Individuals are increasingly viewed as distinct actors in international law, and an infringement of their rights by a state may give rise to a claim being brought before an international organization¹³ or provide the basis for a civil suit. The acknowledgment that the rights of individuals are not necessarily fused with those of the state is important in the field of extraterritorial abductions as it allows an individual to challenge his/her abduction regardless of whether a state also protests the abduction. Furthermore, it means that international law may be able to provide a remedy to individuals who are abducted and removed from the country with the collusion of the host-state.

In the absence of recognition of independent human rights, international law has traditionally been unable to protect an abductee where connivance on the part of the host-state means that there is no violation of the sovereignty of

8. Mavrommatis Palestine Concessions (Greece v. U. K.) 1924 P.C.I.J. (ser. A) No. 2 at 5, 6 (Aug. 30), available at http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis/ (last visited 9/30/05).

9. C. F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 54 (1990).

10. CUTHBERT JOSEPH, *NATIONALITY AND DIPLOMATIC PROTECTION: THE COMMONWEALTH OF NATIONS* 1 (1969).

11. AMERASINGHE, *supra* note 9, at 60.

12. Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST JOHN'S L. REV. 551, 555 (1993).

13. For example, accession to the First Optional Protocol to the International Covenant on Civil and Political Rights allows individuals to bring claims against that particular state before the United Nations Human Rights Committee.

the state, or where the host-state is unwilling to advance a claim.¹⁴ However, as this paper will demonstrate, these frailties of the international legal system have, to an extent, been rectified by the development of an international norm providing individuals with the right not to be subjected to extraterritorial abduction.

IV. ANALYSIS OF *SOSA V. ALVAREZ-MACHAIN*

A. Background

1. *The Criminal Proceedings*

In 1985 a Drug Enforcement Administration (DEA) agent working in Mexico was kidnapped and tortured over two days before being murdered. A grand jury in the Central District of California issued a warrant in 1990 for the arrest of Alvarez, a doctor, who was alleged to have been involved in prolonging the life of the agent for the purpose of interrogation. After Mexico refused to extradite Alvarez, the DEA approved a plan to abduct him in order to bring him to the United States to face charges. The DEA hired Mexican nationals, including Sosa, to abduct Alvarez and detain him overnight before he was flown back to the United States where DEA officials arrested him.¹⁵

Following Mexico's protestation of the violation of its sovereignty, the U.S. Court of Appeals for the Ninth Circuit ruled in 1991 that the abduction violated principles of international law protecting the territorial integrity of a state as well as the extradition treaty between Mexico and the United States.¹⁶ Consequently, the Court ruled that the appropriate remedy was to dismiss the proceedings and for Alvarez to be returned to Mexico.¹⁷ However, the Supreme Court subsequently reversed this unanimous decision by the Court of Appeals. Adhering to an earlier decision in *United States v. Rauscher* that a defendant may not be prosecuted in violation of an extradition treaty,¹⁸ the focus of the Court was on whether the United States-Mexico extradition treaty was breached by Alvarez's abduction. Chief Justice Rehnquist for the majority determined that the extradition treaty was only intended to provide a mechanism for obtaining the custody of an individual in specific circumstances and was never intended to stipulate the only means by which a state could gain custody of an individual.¹⁹ After concluding that the treaty did not expressly prohibit abductions, the majority held that general principles of international law

14. BASSIOUNI, *supra* note 3, at 256.

15. *Alvarez-Machain*, 124 S.Ct. at 2746.

16. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991).

17. *Id.*

18. *United States v. Rauscher*, 119 U.S. 407 (1886).

19. *United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992).

provided no basis for inferring an implied term into the treaty precluding the use of state-sponsored abductions.²⁰

Just as controversial as the Court's meager analysis of international law was the dismissal of the relevance of international law, with the Court declaring it a matter for the Executive to take into consideration.²¹ As well as a scathing dissent from Justice Stevens, that labeled the decision as showing a "shocking disdain" for international law, the decision received near universal criticism from academics.²² However, while the Supreme Court settled the issue of jurisdiction over Alvarez, he was acquitted in his subsequent trial, with the trial judge noting that the case against him involved the "wildest speculation."²³

After having indicated in 1992 that Alvarez's abduction could give rise to a civil remedy,²⁴ the Supreme Court was given another opportunity to consider the facts of the Alvarez case in 2004 when Alvarez filed claims against those involved in his abduction. Alvarez brought a claim against the United States under the Federal Tort Claims Act (FTCA) and a suit against Sosa and other Mexicans involved in his abduction under the Alien Tort Statute (ATS).²⁵

2. *The Civil Proceedings*

a. *The FTCA*

Alvarez's FTCA suit against the United States Government was based on the assertion that the DEA had no authority to arrest Alvarez in Mexico and that the Government was accordingly liable for his false arrest. While the FTCA was intended to make the Government as liable for tortious actions as an individual,²⁶ it provides the Government with immunity for "any claim arising in a foreign country."²⁷ The Supreme Court reversed the decision of the Court of Appeals and held that this exception applied even when tortious acts in foreign states were planned within the United States.²⁸ Consequently the United States Government had immunity against Alvarez's claim.

20. *Id.* at 668–69.

21. *Id.* at 669.

22. See, e.g. Mitchell, *supra* note 5; Paust, *supra* note 12; Wilske, *supra* note 5; Kristin Berdan Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. DAVIS L. REV. 459 (1994); Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209 (1994).

23. *Alvarez-Machain v. Sosa*, 331 F.3d 604, 610 (9th Cir. 2003).

24. *Alvarez-Machain*, 504 U.S. at 669.

25. The Alien Tort Statute is also commonly referred to as the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

26. Mark Dean, *Smith v. United States: Justice Denied Under the FTCA 'Foreign Country' Exception*, 38 ST. LOUIS U. L.J. 553 (1993).

27. 28 U.S.C. § 2680(k) (2000).

28. *Alvarez-Machain*, 124 S.Ct. at 2753.

b. The ATS

This paper focuses on the Supreme Court's treatment of Alvarez's claim under the ATS. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁹

The issue for the courts to determine would appear, on the reading of this statute, to be whether the individuals who abducted Alvarez violated the law of nations or a treaty of the United States. However, rather than closely examining the relevant facts, the court cases became a debate on the role of the ATS under federal law.

The ATS is contentious because of its potentially wide use and political implications. The ATS was enacted in 1789, but remained largely unused for the most part of two centuries.³⁰ However, it was revitalized by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*.³¹ In that case the Court held that a Paraguayan national could sue a former Paraguayan official in the United States for acts of torture committed in Paraguay. The Court held that the prohibition against torture was a specific, universal and obligatory international norm, and consequently there was a breach of the law of nations.³² The view that the ATS could provide a forum for redressing any tortious violations of the law of nations regardless of the nationality of the defendant or the place of the violation prompted a flurry of human rights litigation in the United States.³³ However, some courts in the United States have failed to endorse the approach established in *Filartiga*,³⁴ with many commentators also concerned about the effects that widespread ATS litigation could have on the foreign relations of the United States.³⁵

29. 28 U.S.C. § 1350 (2000).

30. Eugene Kontorovich, *Implementing Sosa v. Alvarez Machain: What Piracy Teaches About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004).

31. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

32. *Id.* at 878.

33. Cases that have been brought by foreigners under the ATS include alleging summary execution, arbitrary detention, causing disappearance, genocide, war crimes, forced labour and violation of environmental standards. Kontorovich, *supra* note 30, at 8.

34. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

35. See, e.g., Covey T. Oliver, *Problems of Cognition and Interpretation in Applying Norms and Customary International Law of Human Rights in the United States Courts*, 4 Hous. J. INT'L L. 59 (1981); Charles F. Marshall, *Re-framing the Alien Tort Act after Kadic v. Karadzic*, 21 N.C.J. INT'L. & COM. REG. 591 (1996); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1 (1994); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Gary Clyde Hufbauer & Nicholas K. Mitrokovas, *International Implications of the Alien Tort Statute*, J. INT'L ECON. L. 245 (2004).

Sosa v. Alvarez-Machain therefore, provided the Supreme Court with an opportunity to determine whether the recent revival of the ATS can be justified as consistent with the intentions of the drafters in 1789. It is readily apparent that to allow suits to be brought for any breach of international law would make the court system unworkable and could involve United States courts determining matters of international law that may have no relevance to the United States. To limit this apparently open-ended jurisdiction, courts have read in a requirement that the aspect of international law invoked by a plaintiff must be a "well-established, universally recognized norm."³⁶ The universal nature of the norm would therefore provide a sufficient link for United States courts to take an interest in providing a forum to hear claims based on the most serious violations of international law. Although the ATS recognizes violations of the "law of nations or a treaty of the United States," by requiring the rule to have universal acceptance courts have effectively limited the scope of the ATS as only applying to breaches of customary international law.³⁷

Despite this judicial limitation on the applicability of the ATS, there are still concerns as to whether the *Filartiga* line of cases is accurate in concluding that the ATS creates a private right of action for individuals. Academic commentary on the role of the ATS appears to be evenly divided into two broad camps: those who believe that the ATS provides subject-matter jurisdiction for breaches of universally recognized norms of international law,³⁸ and those who believe that the ATS merely confers procedural jurisdiction on federal courts to hear claims but does not create a cause of action for individuals.³⁹ This latter viewpoint would severely limit the success of future ATS suits, as it would require plaintiffs to show that a particular norm in international law explicitly provides for a civil remedy.⁴⁰

36. *Filartiga*, 630 F.2d at 878; *In re Estate of Ferdinand E. Marcos Human Rights Litigation v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1992).

37. Jason Jarvis, *A New Paradigm for the Alien Tort Statute under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 674 (2003); see also Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271 (2001).

38. See, e.g., Ryan Goodman and Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Harvard Law Review Ass'n, *International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025 (2001); Justin Lu, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997); Armin Rosencranz and Richard Campbell, *Foreign Environmental and Human Rights Suits Against US Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145 (1999).

39. See, e.g., William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William D'Zurilla *Individual Responsibility for Torture under International Law*, 56 TUL. L. REV. 186 (1981); Marshall, *supra* note 35; Jarvis, *supra* note 37.

40. GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 421 (1988).

It was against this background of contention as to the appropriate function of the ATS that Alvarez brought his claim. Indeed, as it transpired, the majority of submissions, and indeed all the *amici curiae* briefs, focused on the role of the ATS in federal law rather than examining whether Alvarez's extraterritorial abduction was prohibited by customary international law.

B. Decision of the U.S. Court of Appeals for the Ninth Circuit

The Ninth Circuit in *Alvarez-Machain v. Sosa* affirmed the *Filartiga* position that the ATS granted courts jurisdiction to hear claims for breaches of international norms that were "specific, universal, and obligatory."⁴¹ However, the Court found it unnecessary to examine whether there was an international norm prohibiting states from abducting individuals in violation of another state's sovereignty as "the right of a nation to invoke its territorial integrity does not translate into the right of an individual to invoke such interests in the name of the law of nations."⁴² The Court was correct in its view that Alvarez did not have standing to bring his claim solely on the violation of Mexican sovereignty. Although there was a breach of customary international law, to allow a lawsuit to be successful on this basis would mean that any individual of the wronged state would be able to bring a civil claim. The primary aim of the law of torts is to return an injured individual to their position prior to the alleged wrongful act,⁴³ but in this case the harm was caused to Mexico and granting damages to Alvarez would not vindicate this harm.

Although Alvarez could not assert a claim for damages based on the breach of Mexican sovereignty he did have valid arguments for claiming that his extraterritorial abduction breached customary international law, and that damages should accordingly be awarded under the ATS. This claim is based on his individual rights, rather than the claim associated with Mexican sovereignty. However, like the Supreme Court to follow, the Court of Appeals refuted this claim, stating, "our review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from trans-border kidnapping."⁴⁴ This aspect of the decision will be discussed further under the analysis of the Supreme Court decision.

However, the Court also held that although there was no international prohibition against extraterritorial abduction, there was a clear and universally

41. *Alvarez-Machain*, 331 F.3d at 612.

42. *Id.* at 617.

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 901; WILLIAM L. PROSSER, PROSSER AND KEETON ON TORTS 5-6 (5th ed. 1984); W. V. H. ROGERS, WINFIELD & JOLOWICZ ON TORT 2-3 (11th ed. 1979).

44. *Alvarez-Machain*, 331 F.3d at 619.

recognized norm against arbitrary arrest and detention.⁴⁵ Indicating that the DEA lacked authorization for extraterritorial law enforcement, the Court held that Alvarez was arbitrarily detained from the time he was kidnapped until he was handed over to authorities in the United States.⁴⁶ With the en banc Court split 6-4, Sosa appealed to the Supreme Court.

C. Decision of the U.S. Supreme Court

The Supreme Court reversed the decision of the Court of Appeals in a judgment designed to re-fashion future litigation under the ATS. The Supreme Court agreed with Sosa's submissions that it is "frivolous" and "implausible" to believe that the ATS authorizes the creation of causes of action for torts in violation of international law.⁴⁷ However, the Court then back-tracked from its determination that the ATS is only jurisdictional in nature by recognizing that when the statute was created in 1789 Congress would have intended claims to be able to heard for a narrow set of international law violations.⁴⁸ The Court adhered to the view of Sir William Blackstone in Commentaries on the Laws of England that as of 1789 only international law norms prohibiting the violation of safe conduct, the infringement of the rights of ambassadors and piracy were part of the common law.⁴⁹ Accordingly, the Court determined that the ATS can permit suits based on a "modest" number of international law violations.⁵⁰

Justice Souter for the majority indicated that to provide the basis for an ATS suit, not only must an international norm be "specific, universal, and obligatory,"⁵¹ but that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted."⁵²

Beyond the need for specificity and universal acceptance of the norm, the Court did not establish any other conditions for when an international norm would be considered analogous to the stated eighteenth century offences. This was because Alvarez's suit was dismissed as not invoking a precise enough

45. *Id.* at 621.

46. *Id.* at 626.

47. *Alvarez-Machain*, 124 S.Ct. at 2755.

48. *Id.* at 2756.

49. *Id.*

50. *Id.* at 2761.

51. *Id.* at 2766. In his dissent, Justice Scalia criticized the approach of the majority as encouraging uncertainty as the requirement that a norm be "specific, universal, and obligatory" was exactly the same test that led the Ninth Circuit Court of Appeals to reach a contrary conclusion concerning Alvarez's abduction. *Id.* at 2775 (Scalia, J., dissenting).

52. *Alvarez-Machain*, 124 S.Ct. at 2744.

norm to found an ATS claim.⁵³ However, the Court did stress for the purposes of future cases that “this requirement of clear definition is not meant to be the only principle limiting the availability of relief in federal courts for violations of customary international law, although it disposes of this case.”⁵⁴

While the majority limited the scope of future ATS claims, the decision not to rule out future claims under the ATS was vehemently criticized by the dissenting judges. Justice Scalia denounced the majority’s treatment of the ATS as a usurpation of Congress’ lawmaking authority and lamented that “this Court seems incapable of admitting that some matters—any matters—are none of its business.”⁵⁵ The dissent stressed that the “law of nations” was originally understood to refer to the regulation of state-to-state practices, and that any redefinition of the term to restrain a state’s activities towards individuals is an “invention” by academics and human rights advocates.⁵⁶ Such an approach pays scant regard to the importance that human rights now have in international law, and as this paper will make evident later, the notion that international law should be viewed as a static concept at a point in time in the eighteenth century is motivated by ideological convictions. International law is a mobile concept and its development is dependant on the recognition of shifting state practice. It is regrettable that the Supreme Court, and especially the dissenting judges, felt constrained to strictly interpret the reference to the “law of nations” in the circumstances when the ATS was originally enacted.

Alvarez’s arguments before the Supreme Court were based on the conclusion of the Court of Appeals that his abduction constituted an arbitrary arrest and detention as it was conducted without lawful authority.⁵⁷ The Supreme Court did not find it necessary to examine whether the DEA had the authority to sanction an extraterritorial arrest, holding that “Alvarez cites little authority that a rule so broad [as prohibiting arbitrary detention] has the status of a binding customary norm today.”⁵⁸ This paper will not only show that Alvarez was hindered by the decision that his extraterritorial abduction should be analyzed in light of the more general right to be free from arbitrary detention, but that the Court’s analysis of international law was inadequate and failed to recognize the existence of an individual right to be free from state-sponsored abduction.

After indicating that customary international law did not prohibit Alvarez’s abduction and subsequent detention, the Court concluded that “It is enough to

53. *Id.* at 2769.

54. *Id.* at 2766.

55. *Id.* at 2776 (Scalia, J., dissenting).

56. *Id.*

57. Brief of Respondent, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03–339) [hereinafter Brief of Respondent].

58. *Alvarez-Machain*, 124 S.Ct. at 2768.

hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁵⁹

Such a conclusion would appear to indicate that the Court was not examining the content of customary international law from the same perspective as judges and academics around the world. Rather, it was examining whether there is a customary international norm specific enough to provide the basis of a suit in domestic law. However, while the Court could simply dismiss a case by holding that the alleged norm is not specific enough to found a suit under the ATS, such an approach presupposes the existence of the norm at the international level. The first determination of the Court has to be whether the norm exists under customary international law, and, if it does, the Court then has to examine whether it is specific enough to be incorporated into law under the ATS.⁶⁰ The Supreme Court implicitly accepted such an approach by noting that the alleged norm prohibiting arbitrary detention was much too broad to have the status of binding customary law,⁶¹ but that in any event it was also too broad to allow for a suit under the ATS.⁶²

This paper does not challenge the determination that the alleged norm should not be actionable under United States federal law. Rather, it is contended that the Court erred in its conclusion that customary international law is not invoked by the abduction and detention of Alvarez. The implications of the Supreme Court’s decision in *Sosa v. Alvarez-Machain* may not be limited to restricting the possibility of future abductees being able to claim damages under the ATS. By concluding that there was no customary international law prohibition against the forcible abduction and detention of individuals the Court may also have limited the potential for individuals to have criminal proceedings dismissed based a violation of their rights.

59. *Id.* at 2769.

60. Kontorovich concurs with such an approach, indicating that a Court must first determine whether an alleged norm has the required recognition to be part of the law of nations, before moving on to consider whether it can be said to be part of a narrower subset of being defined with a specificity comparable to eighteenth century offences. Kontorovich, *supra* note 30 at 13, 26.

61. *Alvarez-Machain*, 124 S.Ct. at 2744.

62. *Id.* at 2745.

V. IS THERE AN INDIVIDUAL RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION?

A. What Human Right Should be Analyzed?

As the Court of Appeals determined that there is no international norm prohibiting extraterritorial abduction, Alvarez did not pursue this argument before the Supreme Court. Rather, it was argued that his abduction nevertheless violated a prohibition on arbitrary detention. The Supreme Court was therefore only tasked with determining whether there is international recognition of the prohibition of arbitrary detention. It did not examine the trans-border nature of his abduction.⁶³ Such an approach is flawed.

It is artificial to completely separate the analysis of the issues, as the Court of Appeals and the Supreme Court in *Sosa v. Alvarez-Machain* did. The question should not be whether international law provides a general right to be free from arbitrary detention, but whether evidence of this general right may demonstrate the existence of a more specific right to be free from extraterritorial abduction. By only focusing on the alleged right to be free from arbitrary detention the Supreme Court was able to highlight the high degree of generality of conduct that any such right would have to prohibit: ranging from unauthorized and unlawful arrests by police officers⁶⁴ to a temporary detention by officers who overstep their authority.⁶⁵ Due to an inability to prove that there was uniform international practice regarding all these scenarios, the Court was able to dismiss the alleged right to be free from arbitrary detention, without even having to consider the transnational nature of the detention.

By only considering the duration of Alvarez's detention and not taking into account the fact that he was forcibly removed from Mexico to the United States, the Supreme Court's approach fails to take into account the very feature of extraterritorial abductions that makes them scandalous. The Court is effectively treating a transnational abductee in the same manner it would any other individual who had been detained unlawfully by a state. However, where an individual is unlawfully detained by a state within its borders for the purpose of initiating criminal proceedings, there are often many due process rights that domestic courts can invoke to censure the Executive and vindicate the breach of the individual's rights. But where an individual is detained on foreign soil and transferred to another country to face trial, courts have been all too willing to hold that the procedural protections afforded by domestic law do not apply

63. *Id.* at 2767.

64. *Id.* at 2768.

65. *Id.* at 2769.

if the individual is not in the country.⁶⁶ In the absence of such procedural protections it is important that courts considering the human rights of individuals are able to take into account the fact that the individual has been forcibly removed from another state in order to face prosecution.

While the Court of Appeals dismissed Alvarez's claim that there is an individual right prohibiting extraterritorial abduction, it did so on the basis that the United States had no obligation to refrain from abducting an individual.⁶⁷ It was evident that the Court considered itself bound by the 1992 Supreme Court decision that Alvarez's abduction was not explicitly prohibited by the United States-Mexico Extradition Treaty. Such a state-centric approach only upholds individual rights to the extent that they do not restrict the actions of states. As the Supreme Court focused solely on the possible existence of a right to be free from arbitrary detention, the issue of whether individuals have a right to be free from extraterritorial abductions was never satisfactorily examined by either Court.

B. Determining the Content of Customary International Law

International law recognizes that state sovereignty is the basis of inter-state relations, and tries to create a framework where states are only bound by what they consent to. However, over time it is possible for state practice to create a legally binding rule in the form of customary international law.⁶⁸ Unlike treaties, which are only binding on parties to them, customary international law, once established, is universally binding.⁶⁹ Customary international law will emerge if there is consistent state practice coupled with *opinio juris*, a belief that such conduct is legally required.⁷⁰

66. For a good analysis of the issues surrounding the extraterritorial effect of domestic rights see Frank Tuerkheimer, *Globalization of US Law Enforcement: Does the Constitution Come Along?*, 39 Hous. L. R. 307 (2002). Bassiouni notes that while the United States Constitution applies extraterritorially in respect to the conduct of the United States towards its citizens, the law is not settled as to the extent that the Constitution applies to conduct by the United States towards an alien in a foreign country. BASSIOUNI, *supra* note 3, at 280-85. See also Paust, *supra* note 12; Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457; Timothy D. Rudy, *Did We Treaty Away Ker-Frisbie?*, 26 ST. MARY'S L. J. 791 (1995).

67. *Alvarez-Machain*, 331 F.3d at 617.

68. See Ernest Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002), for a good review of critiques on the compatibility of customary international law with traditional consent-based international law.

69. Although as will be discussed, a persistent objector to a customary rule while it is being formulated is not bound by the application of the rule.

70. INT'L LAW ASSOCIATION (ILA), LONDON CONFERENCE: FINAL REPORT OF THE COMMITTEE—STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf>. (last visited 9/30/05) [hereinafter ILA].

The International Court of Justice (ICJ) has indicated that the state practice giving rise to customary international law must be "settled."⁷¹ While the degree of uniformity of the practice must be extensive there is no need for complete consistency before norms become binding.⁷² However, there is provision for states to be exempt from being bound by customary international law if they can be said to have been a persistent objector to a customary rule while it was being developed.⁷³

Although states may act in a uniform manner on an issue, there must also be evidence that such conduct occurred because it corresponded with a legal obligation or a legal right.⁷⁴ This *opinio juris* requirement of customary international law can often be inferred from state practice, or may be proven by official statements or treaty-based law. While the obligations imposed on states by their accession to treaties will not necessarily crystallize into customary international law, this may occur if there is widespread participation and the treaty is of a norm-creating character.⁷⁵ As the International Law Association stated, the creation of customary international law through multilateral treaties occurs because:

[P]arties to the treaty, in relation to nonparties, or non-parties in relation to parties or between themselves, adopt a practice in line with that prescribed (or authorized) by the treaty, but which is in fact independent of it because of the general rule that treaties neither bind nor benefit third parties.⁷⁶

The right to be free from extraterritorial abduction, as evidenced through a prohibition against arbitrary detention, satisfies these requirements of customary international law. The Supreme Court's analysis in *Sosa v. Alvarez-Machain* of the effect that international instruments have on the formation of customary international law was superficial and led the Court to erroneously conclude that customary international law does not protect an individual from extraterritorial abduction. Rather than simply focusing on the general protection from arbitrary detention, it is arguable that the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights have cumulatively shaped state practice regarding the right of individuals not to be subjected to state-sponsored abductions.

71. North Sea Continental Shelf (F. R. G. v. Den.; F. R. G. v. Neth.) 1969 I.C.J. Rep. 3 para. 60-82.

72. *Military and Paramilitary Activities*, 1986 I.C.J. at 95-99; ILA, *supra* note 70, at 25.

73. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18, 1951); ILA, *supra* note 70, at 27.

74. ILA, *supra* note 70, at 32.

75. North Sea Continental Shelf, *supra* note 71, para. 72-73.

76. ILA, *supra* note 70, at 46.

C. *International Human Rights Law*

1. *The United Nations Framework*

Article 2(4) of the United Nations (UN) Charter requires states to refrain from the threat or use of force against the territorial integrity of any state. The UN Security Council has interpreted this obligation to include state-sanctioned abductions without the permission of the state where the abductee resides. After Israel abducted former Nazi Adolph Eichmann from Argentina, the Security Council condemned the action as a violation of Argentina's sovereignty.⁷⁷ Such a prohibition only relates to a violation of state sovereignty and is not applicable where the host-state colludes with the abducting state. Furthermore, the Charter may be seen as only regulating inter-state conduct and therefore not providing individuals with any independent rights.⁷⁸

However, the international law prohibition on violating state sovereignty through the use extraterritorial abduction is relevant to the issue of whether individuals possess an international right to be free from abductions. In many cases the international denunciation of abductions also extends to the fact that states have had to resort to extra-legal means to obtain custody of suspected criminals.⁷⁹ Consistent state practice of refraining from conducting extra-territorial abductions may be due to the norm protecting a state's territorial integrity, but such practice can also be used to found a norm protecting the rights of an individual in such situations. However, proving that states refrain from forcible abductions because of a concern for human rights remains an important impediment to proving the existence of an individual right to be free from transnational abductions.

One of the purposes of the UN is to promote and encourage respect for "fundamental freedoms"⁸⁰ and to this end the Universal Declaration of Human Rights⁸¹ was adopted by the General Assembly to establish non-binding principles relating to human rights and individual freedoms. At the time it was not viewed as imposing legal obligations, but constant reaffirmation by the General Assembly, universal acceptance by states, and wide-ranging reference to the Declaration in numerous international and national instruments, has meant that many of its standards have become binding customary international law.⁸²

77. See generally S.C. Res. 138, U.N. Doc. S/RES/4349 (June 23, 1960).

78. Gaetano Arangio-Ruiz, *The 'Federal Analogy' and U.N. Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT'L L. 1, 9 (1997).

79. Costi, *supra* note 5, at 68.

80. U.N. CHARTER art. 1, para. 3.

81. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 701. After a thorough analysis of

Although some academics believe that the Declaration in its entirety represents customary international law,⁸³ for the purposes of this paper it is only necessary to examine the contribution that specific rights contained in the Declaration have had towards a customary international norm prohibiting extraterritorial abduction.

Article 3 of the Universal Declaration provides that "everyone has the right to life, liberty and security of person," while article 9 more specifically states, "no one shall be subjected to arbitrary arrest, detention or exile." The United States submitted to the ICJ in the Case Concerning United States Diplomatic and Consular Staff in Tehran⁸⁴ (The Hostages Case) that not only did every state have an obligation to observe the Universal Declaration, but that articles 3 and 9 were fundamental rights to which all individuals were entitled.⁸⁵ The Court agreed, concluding that "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."⁸⁶ Given the substantial contribution that the Declaration has had in the creation of customary international human rights law, it is very significant that the ICJ indicated that individuals have a basic right not to be arbitrarily detained. The recognition that such a right is consistent with the framework of the UN may help to show that the *opinio juris* for any customary norm prohibiting extraterritorial abduction can be found through the desire of states to uphold human rights and to act consistently with the principles of the UN.

In light of the link provided by the ICJ between human rights and the UN Charter it is implausible that the prohibition of arbitrary detention would not include situations when an individual is forcibly abducted from another state. As a transnational abduction violates not only the rights of the individual, but also the territorial sovereignty of a state, such abductions would undermine the

state practice the International Law Association declared in 1994 that "many if not all of the rights elaborated in the . . . Declaration . . . are widely recognized as constituting rules of customary international law." INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SIXTH CONFERENCE, BUENOS AIRES (1994).

83. As declared by the *Montreal Statement for the Assembly for Human Rights*, Mar. 22-27, 1968, reprinted in 9 I.C.J. REV., June 1969; Professor Humphrey has declared that the Declaration represents customary international law and is "the universally accepted interpretation and definition of the human rights left undefined by the Charter." John Humphrey, *The International Bill of Rights: Scope and Implementation* 17 W.M. & MARY L. REV. 527, 529 (1976); Professor Sohn also held that the Declaration had become a universally binding instrument. Louis B Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977).

84. Case Concerning United States Diplomatic and Consular Staff in Tehran (U. S. v. Iran) 1980 I.C.J. 3 (May 24).

85. Memorial of the United States (U.S. v. Iran), 1980 I.C.J. 182 (Jan. 12).

86. *Iran*, 1980 I.C.J. at ¶ 91.

founding principles of the UN. Despite these indications of how the Universal Declaration of Human Rights would inform the content of customary international law, the Supreme Court in *Sosa v. Alvarez-Machain* did not conduct any such analysis. After noting that the Declaration does not by itself impose any obligations under international law,⁸⁷ the Court failed to adequately examine the role that the Declaration has played in establishing human rights norms, and particularly the evidence that the right to be free from arbitrary detention under the Declaration has crystallized into customary international law. The neglect of the Declaration and the principles underpinning the UN Charter illustrate the extent to which the Court's analysis of customary international law was result-orientated.

2. *The International Covenant on Civil and Political Rights*

Article 9(1) of the ICCPR provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."⁸⁸

Analysis of this right not to be subjected to arbitrary detention must answer two questions: does it provide an individual with the right to be free from extra-territorial abduction? And if so, what is the status of this right in international law?

The United Nations Human Rights Committee, which is tasked with hearing ICCPR claims under the Optional Protocol, has had several opportunities to examine the relationship between Article 9(1) and state-sponsored abductions. In *Celiberti de Casariego v. Uruguay*,⁸⁹ a claim was brought to the Committee on behalf of a Uruguayan national who had been detained by Uruguayan officials in Brazil and forcibly removed to Uruguay where she was charged with offences against that state. The Committee upheld the claim, concluding that the "act of abduction into Uruguayan territory" constituted an arbitrary arrest and detention.⁹⁰ Importantly the Committee noted that simply because a state party is not acting within its borders will not preclude the application of the Covenant.⁹¹ The Committee reached similar conclusions in the cases of *Saldias de Lopez v. Uruguay*⁹² and *Almeida de Quinteros v.*

87. *Alvarez-Machain*, 124 S.Ct. at 2767.

88. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.].

89. U.N. Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay*, Commc'n No. 56/1979, U.N. Doc. CCPR/C/OP/1 (1984) [hereinafter *Celiberti de Carariego*].

90. *Id.* para. 11.

91. *Id.* para. 10.1.

92. U.N. Human Rights Committee, *Delia Saldias de Lopez v. Uruguay*, Commc'n No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981).

Uruguay.⁹³ The United Nations Working Group on Arbitrary Detention has even examined the facts of Alvarez's treatment and held that the abduction of Alvarez was contrary to international law as well as in violation of Article 9(1) of the Covenant.⁹⁴

These decisions indicate that the Human Rights Committee has taken a very strong position in favor of protecting the rights of abductees. As commentator Paul Mitchell notes, "the Committee reinforced the customary international law rule prohibiting forcible abduction and transplanted the rule into the human rights context, protecting individuals qua individuals."⁹⁵ However, the decisions go further than simply recognizing the right of individuals to be free from forcible state-sponsored abductions. They also did not consider it relevant to examine whether the host-states had consented to the rendition of the individuals. Indeed in *Giry v. Dominican Republic*⁹⁶ and *Canon Garcia v. Ecuador*⁹⁷ the Committee held that even in situations where the host-state agrees to the irregular rendition of an individual rather than extradition, the abduction of an individual would constitute arbitrary arrest and detention. This is a dramatic departure away from the traditional position under international law whereby consent or collusion on the part of the host-state would mean that there was no breach of the state's sovereignty and consequently no possible remedy for the individual. Rather, it recognizes a right of the individual, regardless of a violation of the state's sovereignty.

The ICJ has indicated that the ability of states to make reservations to a right contained in a convention weighs against the potentially norm-creating character of the convention, and the likelihood of the right being transposed into customary international law.⁹⁸ It is therefore pertinent that article 4 of the ICCPR allows states to derogate from the prohibition on arbitrary detention in times of public emergency threatening the life of the nation. This may appear to undermine the contention that the prohibition on arbitrary detention is not limited to the ICCPR but also exists under customary international law. However, the Human Rights Committee has determined that while the right may be derogated from in emergencies, the right to be free from arbitrary arrest and detention is part of customary international law and accordingly a state may not

93. U.N. Human Rights Committee, *Almeida de Quinteros v. Uruguay*, Commc'n No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 (1983) [hereinafter *Almeida de Quinteros*].

94. U.N. Econ. & Soc. Council [ECOSOC], U. N. Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, at 48, U.N. Doc. E/CN.4/1994/27 (Sept. 30, 1993).

95. Mitchell, *supra* note 5, at 442.

96. U.N. Human Rights Committee, *Giry v. Dom. Rep.*, Commc'n No. 193/1985, U.N. Doc. CCPR/C/39/D/193/1985 (1990).

97. U.N. Human Rights Committee, *Canón García v. Ecuador*, Commc'n No. 319/1988, U.N. Doc. CCPR/C/43/D/319/1988 (1991).

98. *North Sea Continental Shelf*, *supra* note 71, para. 60-82.

reserve the possibility of contravening this right.⁹⁹ The possibility of derogating from this right in specific circumstances was intended to provide a means whereby a state may have to resort to extreme measures when the legitimate control of the state is threatened.¹⁰⁰ The narrow confines under which article 9 is inapplicable indicates the consensus of states regarding the importance of this right to individuals. This consensus is widespread, with 152 states currently party to the ICCPR, and another eight states being signatories.¹⁰¹

While the decisions of the Human Rights Committee attempt to infer the existence of a customary norm prohibiting extraterritorial abduction, it is arguable that by themselves they do no more than emphasize the ICCPR prohibition on extraterritorial abduction. However, the extensive recognition of the rights contained in the Covenant, the fact that Covenant is most certainly of a norm-creating character, and the steadfast position of the Human Rights Committee regarding the prohibition of extraterritorial abduction is certainly a starting point towards showing that there is enough uniformity amongst states to substantiate a claim that the right to be free from extraterritorial abduction has crystallized as customary international law.

The Supreme Court did not seem particularly swayed by the rights afforded by the ICCPR. Although the ICCPR had not been ratified by the United States at the time of Alvarez's abduction,¹⁰² it was in force when the Supreme Court had to consider his suit based on the violation of customary international law. The Court placed great weight on the Senate's decision not to make the Covenant directly enforceable in domestic law, stating that "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing."¹⁰³ Such an assertion is to drastically misread the extent of the non-self-executing declaration and the relationship between the ICCPR and customary international law.

99. Office of the High Commissioner of Human Rights, General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, para. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (November 4, 1994) [hereinafter Issues Relating to Reservations].

100. *Id.* para. 10.

101. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, (2005).

102. Alvarez was abducted on April 2, 1990. *Alvarez-Machain*, 331 F.3d at 609. The International Covenant on Civil and Political Rights entered into force for the United States on September 8, 1992. I.C.C.P.R., *supra* note 88.

103. *Alvarez-Machain*, 124 S.Ct. at 2763.

Under the Constitution of the United States a treaty is as much a part of domestic law as an Act passed by the legislature.¹⁰⁴ However, by attaching a non-self-executing declaration to the ratified treaty the legislature can either remove the standing of any individual to bring a claim under the treaty, remove the right of any individual to rely on the treaty in any form, or deny the existence of a cause of action in the absence of other incorporating legislation.¹⁰⁵ When the Senate ratified the ICCPR, a non-self-executing declaration was attached with the Senate Foreign Relations Committee accentuating that its "intent is to clarify that the Covenant will not create a private cause of action in US courts."¹⁰⁶

In *Sosa v. Alvarez-Machain*, the Court used the legislative desire that causes of action should not be directly founded on the ICCPR to dismiss any relevance that the ICCPR may have in creating customary international law. The implication of this approach is that Justice Souter viewed the non-self-executing declaration as taking precedence over the content of customary international law. The ICJ has declared that there are "no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own."¹⁰⁷ However, it appears that this is precisely the basis of the Supreme Court's approach to examining the ICCPR: the Court used the fact that the prohibition on arbitrary detention under ICCPR was not directly enforceable in domestic law to undermine the applicability of the same right being enforceable through customary international law.¹⁰⁸ The Court placed too much weight on the status of the ICCPR under United States law rather than examining international practice concerning such rights. Alvarez was not seeking to create a cause of action based on the ICCPR, but merely claiming that multilateral instruments such as the ICCPR directly inform the content of customary international law.

Furthermore, the extent to which the ICCPR is self-executing in the domestic law of the United States is irrelevant as the ATS incorporates the "law of nations." The Court should have recognized the role that multilateral

104. U.S. CONST. art. VI, cl. 2.

105. Chrissy Fox, *Implications of the United States' Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations*, 11 TUL. J. INT'L & COMP. L. 303, 309 (2003).

106. U.S. Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, Jan. 30, 1992, 31 I.L.M. 645, 657 [hereinafter Senate Committee on Foreign Relations].

107. *Military and Paramilitary Activities*, 1986 I.C.J. at 95-99.

108. Indeed *Sosa* submitted that when the Court came to examine the content of customary international law it could not take into account any treaty or international instrument that the United States had not ratified as to do otherwise would compromise separation of powers principles. Brief of Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739 (2004) (No. 03-339).

conventions, such as the ICCPR, have in formulating customary international law and examined whether state practice and jurisprudence based on the rights under the Convention had developed into a binding international norm prohibiting abduction and arbitrary detention. Given the influence that the ICCPR has on the formation of customary international law and the fact that the United States is a party to the Convention, it is remarkable that the United States Supreme Court viewed itself as being prevented from "interpreting and applying" the ICCPR.¹⁰⁹ The Court's refusal to give adequate weight to the rights contained within the ICCPR essentially negates the principle purpose of the Covenant, which is to protect individuals from their own government.

3. *The European Convention on Human Rights*

The European Convention on Human Rights¹¹⁰ (European Convention) is another international instrument that has been invoked to protect the rights of individuals who have been forcibly abducted from another state in order to face prosecution. Although the Convention has obvious geographical limitations as to the countries that it binds, it is yet another indication of a collective recognition of the right not to be subjected to arbitrary detention. Article 5(1) guarantees individuals the right to "liberty and security of person." Although the language of "arbitrary detention" contained in the ICCPR is not used, Article 5 requires all deprivations of liberty to be prescribed by law and to fall within the exhaustive list of possible justifications for detention. European institutions have had several opportunities to examine cases of extraterritorial abduction and these cases contribute to the understanding of the right to be free from state-sponsored abductions under customary international law.

In *Bozano v. France*,¹¹¹ after a failed extradition application to transfer an individual from France to Italy, the individual was abducted by French policemen and was forcibly taken into Switzerland, where he was subsequently extradited to Italy. The European Court of Human Rights (ECHR) upheld the applicant's complaint, concluding that the transfer by French authorities was a disguised form of extradition designed to circumvent an earlier unfavorable decision.¹¹² The refusal of the police to follow the domestic laws of France rendered the abduction unlawful and in breach of article 5(1) of the Covenant. Furthermore, the Court held that any measure depriving an individual of liberty must be compatible with the purposes of article 5, which is to protect an

109. *Alvarez-Machain*, 124 S.Ct. at 2763.

110. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention for Protection of Human Rights and Fundamental Freedoms].

111. *Bozano v. France*, 9 Eur. Ct. H.R. (ser. A) 297 (1986).

112. *Id.* at 317.

individual from arbitrariness.¹¹³ This purposive approach meant that the Court was not solely limited to considering the legality of the detention, but could also take into account the entire context of the abduction, detention, the effect of the abduction on the applicant, and deliberateness with which French officials violated the law. The willingness of the Court to examine all the circumstances surrounding the abduction, rather than solely focusing on the legality of the detention as required by a literal reading of article 5(1), illustrates a recognition of the serious implications that an abduction may have on an individual's interests.

The European Commission on Human Rights was more explicit in its condemnation of abductions being contrary to article 5(1) in *Stocké v. Germany*.¹¹⁴ The applicant alleged that he had been brought into Germany against his will by a private citizen in collusion with the German police. The claim was dismissed as unproven, although the Commission held that if German officials had arranged the abduction then "the Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention."¹¹⁵

Despite the indications that the European Convention provided individuals with a robust right not to be forcibly abducted by states, this right is not independent from the rights of the individual's state. In both *Illich Sanchez Ramirez v. France*¹¹⁶ and *Ocalan v. Turkey*¹¹⁷ it was held that consent on the part of the host-state meant that there was no unlawful detention under article 5. The ECHR noted that because the European Convention contains no provisions on extradition procedure, all that is required for a rendition to be consistent with the Convention is a legal basis for the transfer (such as an arrest warrant issued by the state of origin) and co-operation on the part of the host-state.¹¹⁸ It is truly remarkable that an individual's right to liberty under the Convention, a Convention created solely to protect individuals, is entirely dependant on whether a state complains that its sovereignty has been violated. While this aspect may undermine the significance given to an individual's right to liberty, it is important to note that the ECHR held that the abduction of an individual in violation of a state's sovereignty breaches the right to liberty under article 5(1).¹¹⁹ While not going as far as it could to uphold human rights, such a view reaffirms the international endorsement of the right to be free from forcible transnational abduction.

113. *Id.*

114. *Stocké v. Germany*, 13 Eur. Ct. H.R. (ser. A) 839 (1991).

115. *Id.* at 852.

116. *Illich Sanchez Ramirez v. France*, Eur. Ct. H.R., application no. 28780/95 (1996).

117. *Ocalan v. Turkey*, 37 Eur. Ct. H.R. 10 (2003).

118. *Id.* at 273.

119. *Id.*

Although the European Court of Human Rights has been unequivocal that the arrest of an individual by authorities of one state in contravention of another state's sovereignty involves not only state responsibility vis-à-vis the other state, but also violates an individual's right to security under article 5(1),¹²⁰ the Supreme Court in *Sosa v. Alvarez-Machain* was unmoved. Neither the European Covenant nor the decisions on the issue of abduction were even canvassed by the judgment for the majority. For the Court to conclude that there was no evidence to suggest the existence of customary rule prohibiting arbitrary detention¹²¹ without examining the substantial European jurisprudence on the matter is an oversight. The Court's fixated analysis on the generality surrounding the alleged right to arbitrary detention ignores the more specific right that has been recognized under the ICCPR and the European Convention: that individuals have a right to be free from an extraterritorial abduction conducted in violation of the sovereignty of another state. Although the European Covenant does not create customary international law, when taken in conjunction with other international instruments and state practice it is apparent that there is a global repudiation of the use of extraterritorial abduction.

D. The Approach of Domestic Courts

Despite the evidence of an international consensus that individuals have a right to be free from being forcibly abducted and transferred to another state, there are occasions when domestic courts will proceed with the prosecution of the individual regardless of any breach of their rights. The often-followed decision by the United States Supreme Court in *Ker v. Illinois* held that courts could exercise jurisdiction over an individual regardless of the unlawful manner in which an individual may be made to appear before the Court.¹²² This principle stems from the Roman maxim "*mala captus bene detentus*": improperly captured, properly detained.¹²³ The doctrine has been rigorously enforced by courts in the United States,¹²⁴ while at the same time being vociferously criticized by academics as endorsing the Executive's violations of international law.¹²⁵

However, decisions that an individual should be prosecuted following an abduction are not necessarily inconsistent with the existence of a right to be free

120. Mitchell, *supra* note 5, at 429.

121. *Alvarez-Machain*, 124 S.Ct. at 2768.

122. *Ker v. Illinois*, 119 U.S. 436 (1886).

123. Rudy, *supra* note 66, at 802.

124. See e.g. *Frisbie v. Collins*, 342 U.S. 519 (1952); *United States v. Yunis*, 681 F.Supp. 896 (D.C. Cir. 1988); *United States v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990); *Alvarez-Machain*, 504 U.S. at 655.

125. See e.g. Jonathan Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. R. 939 (1993); Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265 (1952); Wilske, *supra* note 5.

from extraterritorial abduction. In such situations, the courts were not concerned with the existence of a human right prohibiting transnational abductions, but rather whether a breach of the alleged right would require proceedings to be dismissed and the individual to be repatriated. Indeed, in many of these cases, the courts avoided examining whether there is such a right by deeming it irrelevant given that a breach of international law is a matter for the Executive to remedy.¹²⁶ The refusal of United States courts to decline jurisdiction over transnational abductees is relevant to the scope of remedies available to abductees rather than a rejection of the right to be free from extraterritorial abduction. The existence of a customary norm protecting individuals from extraterritorial abduction and a possible norm providing a remedy for a breach of such a right are two separate issues.

Although courts have traditionally refused to examine the circumstances of the arrest and detention of an abductee, there has been much progress in the recognition of due process and human rights since the *Ker v. Illinois* decision of 1886. The narrow conception of due process as only being concerned with whether the accused has a fair trial now expands to situations where official pre-trial misconduct can result in evidence being excluded.¹²⁷ The U.S. Court of Appeals for the Second Circuit in *U.S. v. Toscanino*¹²⁸ recognized that the exclusion of evidence was not an end in itself, but was a means to give effect to the principles of due process and to ensure that the government should not be able to benefit from its illegal conduct.¹²⁹ The proceedings against Toscanino, who was abducted and tortured while in custody, were dismissed. There, the Court gave particular weight to the need to uphold constitutional norms, which were influenced by international human rights law.¹³⁰ However, the effect of this case in advancing human rights law is minimal, as the decision has been interpreted as only applying where the individual is treated inhumanely while in custody.¹³¹

The greatest challenge to the traditional view that courts should not concern themselves with the means by which an abductee may be brought before them comes from South Africa in *State v. Ebrahim*¹³² and from the United Kingdom in *Bennett v. Horseferry Road Magistrates' Court and another*.¹³³ In Ebrahim, the Court established a link between the sound

126. See *Alvarez-Machain*, 504 U.S. at 669 (holding that "the decision of whether respondent should be returned to Mexico...is a matter for the Executive Branch").

127. Mitchell, *supra* note 55, at 400.

128. *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974).

129. Mitchell, *supra* note 5, at 401.

130. *Toscanino*, 500 F.2d at 275.

131. *Noriega*, 746 F.Supp. at 1531.

132. *State v. Ebrahim*, 95 I.L.R. 417 (S. Afr. 1992).

133. THE ALL ENGLAND LAW REPORTS ANNUAL REVIEW 222 (BUTTERWORTH 1994) [hereinafter ALL

administration of justice and the fundamental principles of the promotion of human rights and friendly international relations.¹³⁴ After an analysis of the influence of international human rights norms on domestic law the Court dismissed proceedings and Ebrahim was subsequently able to claim damages for his unlawful abduction and detention.¹³⁵ In *Bennett*, the House of Lords determined that courts had the authority to examine the circumstances surrounding the abduction of Bennett to face charges in England and that to allow criminal proceedings to continue in such a situation would be an abuse of process. While the individual judgments illustrate a myriad of factors that each judge used when concluding an abuse of power by the Executive existed, Lord Griffiths indicated that the Law Lords have a responsibility "to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law."¹³⁶ Lord Lowry rejected the Supreme Court's approach in *Ker v. Illinois*, holding that the question should not be whether a court has jurisdiction to try an individual, but whether such jurisdiction should be exercised in light of the violation of rights under international law.¹³⁷

Although the courts in Ebrahim and Bennett did not examine whether individuals had explicit right to be free from extraterritorial abduction, the highest courts in South Africa and the United Kingdom both used the general principles of international human rights law to conclude that the prosecution of an abductee would violate domestic standards of due process. However, the reluctance of many domestic courts (particularly in the United States) to recognize and apply international human rights law in such situations is concerning. The contention that courts need not concern themselves with the rights of the individual prior to trial is an archaic notion that has no place in a global community that is founded upon respect for human rights.¹³⁸

The approach of domestic courts to cases can influence the content of customary international law by shaping state practice and indicating the presence of a customary norm. However, the approach of domestic courts to cases concerning extraterritorial abduction is a neutral factor in the analysis of customary international human rights law on the topic. Although the vast majority of prosecutions stemming from the abduction of an individual have been upheld as valid, it is important to appreciate that such judicial decisions do not undermine the existence of an individual right to be free from extraterritorial abduction. The decisions merely indicate that if such a right exists it is unlikely

ENGLAND LAW REPORTS ANNUAL REVIEW].

134. *Ebrahim*, 95 I.L.R. at 442.

135. *Id.* at 417.

136. *Regina v. Horseferry Rd. Magis. Ct. (Ex parte Bennett)*, [1994] 1 A.C. 42, 62 (Eng. H.L. 1993).

137. ALL ENGLAND LAW REPORTS ANNUAL REVIEW, *supra* note 133, at 163.

138. See U.N. CHARTER pmbl. (declaring that its members are determined to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . .").

that the remedy of a stay of prosecution has also entered into customary international law. Such a view has come about through the flawed belief that the judiciary has no role to play in providing a remedy to an individual subsequent to a violation of international law.¹³⁹ Although there is some indication through South African and United Kingdom jurisprudence that the human rights of an abductee are becoming increasingly relevant before domestic courts, there is not enough uniform practice throughout the world to conclude that the approach of the judiciary in such cases either contributes to or contradicts the existence of a customary norm protecting an individual from extraterritorial abduction.

E. Resolving the Issue: Is There a Customary Norm?

State practice concerning the abduction of individuals in order to bring them before domestic courts will never be completely uniform. States are inherently self-interested and are reluctant to ascribe to a norm that may limit their ability to conduct self-help operations in the future.¹⁴⁰ In the absence of an enforcement mechanism for international law, states may often decide that the benefits of breaching international law outweigh the costs. Therefore, it is important that state actions that appear to be contrary to an alleged customary norm are not automatically assumed to be evidence of the absence of the norm. Inconsistent state practice could instead illustrate that the state concerned is a persistent objector and that the state is not bound by the norm, or the state is breaching an international norm that is otherwise adhered to.

The relevant test for examining inconsistent state actions was offered by the ICJ in *Nicaragua v. United States*, which emphasized that there is no need for state practice to be in rigorous conformity with the rule.¹⁴¹ The Court went on to comment that:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹⁴²

139. See Costi, *supra* note 5, at 95–97 (discussing how the judiciary can invoke the international responsibility of the state by ignoring an infringement of international law).

140. JOHN BAYLIS & STEVE SMITH, *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 117 (1997).

141. *Military and Paramilitary Activities*, 1986 I.C.J. at 95–99.

142. *Id.*

It is evident that state-sponsored abductions are certainly not seen as the recognition of a new rule of international law, but are typically universally condemned as infringing customary international human rights law.

The abduction of Alvarez-Machain by the United States and the subsequent decision by the Supreme Court in 1992 received international condemnation. The Canadian government stated that it would not tolerate such abductions from its soil, while the Argentine President derided the court decision "a horror."¹⁴³ As well as the abduction receiving widespread criticism from states, there was near universal criticism from non-governmental organizations, lawyers and academics. Furthermore the Inter-American Juridical Committee condemned the attitude of the United States Government as violating fundamental rules and principles of international law.¹⁴⁴ Such criticism is comparable to that of Israel following the abduction of Eichmann, where disapproval by individual states was supported by a Security Council resolution decrying the breach of international law.¹⁴⁵

When the United States has conducted extraterritorial operations to seize suspected criminals, it has always attempted to tone down the implications that such conduct could have for international law. Following the abduction of Alvarez-Machain, a State Department Spokesman said that the Supreme Court decision did "not represent a 'green light' for future abductions," and that only in "extreme cases" would kidnapping be justified.¹⁴⁶ Concern that foreign states might undertake extraterritorial law enforcement operations in the United States also led to a State Department lawyer resisting the contention that abductions were consistent with international law.¹⁴⁷ The view that transnational abductions are inconsistent with customary international law is further supported by a 1989 memorandum to the Attorney General outlining the President's authority to breach customary international law by ordering the abduction of an individual from a foreign country.¹⁴⁸ By arguing that transnational abductions are the exception rather than the norm the United States is fulfilling the test established

143. CONSTITUTIONAL RIGHTS FOUNDATION, SHOULD NATIONS HAVE THE RIGHT TO KIDNAP CRIMINAL SUSPECTS? (2000), available at http://www.crf-usa.org/bria/bria10_4.html (last visited Oct. 4, 2005).

144. Inter-American Juridical Committee, *Legal Opinion on the Decision of the U.S. Supreme Court in the Alvarez-Machain Case*, in 13 HRLJ 395, 397 (1992).

145. S.C. Res. 138, *supra* note 77.

146. CONSTITUTIONAL RIGHTS FOUNDATION, *supra* note 143.

147. *Hearing before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary "Bill To Authorize Prosecution of Terrorists and Others Who Attack US Government Employees and Citizens Abroad,"* 99th Cong., 1st Sess. 63 (1985).

148. U.S. DEPARTMENT OF JUSTICE, MEMORANDUM OPINION FOR THE ATTORNEY GENERAL: AUTHORITY OF THE FEDERAL BUREAU OF INVESTIGATION TO OVERRIDE INTERNATIONAL LAW IN EXTRATERRITORIAL LAW ENFORCEMENT ACTIVITIES (1989), available at http://www.fas.org/irp/agency/doj/fbi/olc_override.pdf (last visited Oct. 6, 2005).

in the Nicaragua case: the conduct is typically viewed as breaching a rule rather than creating a new rule.

While the international denunciation of forcible abductions will often focus on any breach of state sovereignty, there is sufficient state practice and *opinio juris* to suggest that a customary norm exists whereby the human rights of an individual require states to refrain from extraterritorial abduction. Cumulatively, the decisions by the Human Rights Committee and the European Court of Human Rights, the recognition of international human rights instruments, and the practice of states provide enough evidence of consistent state practice and *opinio juris* to establish a customary norm protecting individuals from extraterritorial abduction.

The right to be free from abduction exists independently of whether there is also a breach of the host-state's sovereignty. To make a breach of an individual's rights dependant on there first being a breach of state sovereignty is to effectively limit the scope of the right to being no more than a derivative of a state's right to territorial inviolability. If the prohibition of arbitrary detention is to be an effective human right it must also be available to protect an individual in situations where the host-state consents to their abduction. This approach is endorsed by Harry Blackmun, a dissenting Supreme Court Justice in *United States v. Alvarez-Machain*, who commented, "even with the consent of the foreign sovereign, kidnapping a foreign national flagrantly violates peremptory human rights norms."¹⁴⁹ Such a view recognizes that the rights of an abducted individual will be affected in the same manner whether the host-state is complicit in the abduction or not.

F. The Implications of a Breach of This Right

When states breach international law there are legal consequences (which may include reparation, compensation, and/or apologies) that flow from the wrongful action.¹⁵⁰ The Permanent Court of International Justice upheld the principles of state responsibility by stating that "the essential principle . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."¹⁵¹

For an individual who has been forcibly removed to another jurisdiction to stand trial, the most desirable form of reparation would be for the criminal proceedings to be dismissed and to be repatriated. It is widely recognized that when an abduction breaches a state's sovereignty and the protesting state

149. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 42 (1994).

150. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 6; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, at 501.

151. *Chorzow Factory Case (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 1, 47.

demands the return of the individual then the first duty on the abducting state is to return the individual.¹⁵² However, this remedy is one that is owed by one state to another and would not be applicable in the absence of a formal protest from the host-state. The issue of the responsibility of states towards individuals for breaches of international law is more uncertain,¹⁵³ and for this reason was not incorporated by the International Law Commission's Draft Articles on State Responsibility.¹⁵⁴ Unlike international human rights conventions, which tend to explicitly require a state to provide an effective remedy to an individual whose rights have been breached,¹⁵⁵ there is as yet no recognition of a binding requirement on states to provide individuals with a specific remedy when their human rights are breached.

Due to the uncertain content of international law regarding the remedies that states owe to individuals, the ability of abductees to have a remedy for a breach of their rights under customary international law is dependant on the extent of each state's reception of international law into the domestic legal system.¹⁵⁶ The status of international law in domestic law varies greatly, and each legal system will have a slightly different view as to whether domestic courts have a duty to allow individuals to enforce a right that exists at an international level. It is outside the scope of this paper to conduct an exhaustive inquiry into the trends relating to the status of international law in domestic legal systems, but it is pertinent to note that the failure of courts to uphold international law can invoke the international responsibility of the state. The conduct of domestic courts are regarded under international law as being attributable to the state,¹⁵⁷ and so a judicial infringement of an individual's international rights can make the state responsible for remedying the breach.

152. OPPENHEIM, *supra* note 4, at 295.; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 432; BASSIOUNI, *supra* note 3, at 290.

153. Bassiouni is of the opinion that no area of international law is "as riddled with confusion" as the topic of the enforceability of internationally protected human rights in domestic law. BASSIOUNI, *supra* note 3, at 291.

154. Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles: Introduction and Overview*, 96 A.J.I.L. 773 at 790 (2002). However, art. 33(2) of the I.L.C. Draft Articles makes it clear that the Draft Articles should be read as not prejudicing any international responsibility of a state to a non-state actor. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 6, art. 33(2).

155. See, e.g., Universal Declaration of Human Rights, *supra* note 81; International Covenant on Civil and Political Rights, *supra* note 88, art. 2(3); European Convention, *supra* note 110, art. 13; American Convention on Human Rights: "Pact of San Jose, Costa Rica," art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123.

156. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 703.

157. Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (April 29); see also Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 6, art. 4.

However, domestic courts cannot be said to be violating an individual's rights simply by allowing the prosecution of an abductee. Therefore, the key issue is whether domestic courts are under an international obligation to remedy the Executive's breach of international law by refusing to prosecute an abductee. While it may be desirable for domestic courts to refuse to endorse a state's violation of its human rights obligations, there is no international obligation on domestic courts to decline jurisdiction over an abductee. The prevalence of the rule of "male captus bene detentus" throughout the world, while controversial, is clear evidence of the non-existence of any norm requiring states to decline the prosecution of abductees. It is therefore apparent that the existence in customary international law of an individual right to be free from extraterritorial abduction is not supplemented by any such norm requiring domestic courts to divest themselves of hearing the case.

While it may be premature to claim that there is a customary rule compelling courts to refuse to exercise jurisdiction over abductees, it is not accurate to claim that the violation of an individual's internationally guaranteed rights is irrelevant to a court's consideration whether or not to exercise jurisdiction.¹⁵⁸ As evidenced by the decisions of Ebrahim and Bennett, where domestic courts declined to exercise jurisdiction, the human rights of an individual can be used in a domestic context. These two cases provide important examples whereby courts were able to use international legal principles to interpret the domestic expectations of due process. Such decisions should be applauded as not only giving effect to an individual's rights, but also acting as a deterrent to future violations of international law.¹⁵⁹ Only by declining to exercise jurisdiction can domestic courts maintain the integrity of international human rights and encourage states to abide by their international legal obligations.

Unfortunately for the subjects of an extraterritorial abduction, given that international law does not mandate that domestic courts must refuse to exercise jurisdiction over abductees, there will be occasions when they are not provided with an effective domestic remedy. The only other traditional remedies, compensation and an apology, are unlikely to resolve the problem for abductees that they are now within the jurisdiction of a state that is determined to prosecute them. However, it would be a misconception to consequently view

158. Borelli, *supra* note 5, at 8.

159. It is notable that the ICTY in *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Sentencing Judgment – In Trial Chamber II, ¶ 30 (Oct. 9, 2002) determined that it could exercise jurisdiction over the defendant who had been forcibly abducted, but did so only after concluding that the Tribunal's duty to respect human rights was outweighed in this case by the fact that the defendant had been charged with a serious violation of international humanitarian law. *Id.* While departing from the traditional *mala captus bene detentus* rule, such a decision only acts as a deterrent to state abductions of minor criminals and indicates that the violation of the human rights of more serious offenders can be overlooked by a higher duty to prosecute serious human rights violations. *Id.*

the right to be free from extraterritorial abduction as little more than an “empty right.” The right of individuals to be free from state-sponsored abductions, similar to much of international law, must derive a great deal of the force from its prescriptive nature rather than the presence of an enforcement mechanism. Not only does the right carry much moral force, but it can be viewed as an important step towards the formation of an individual right not to be prosecuted following the unlawful transfer from another state.¹⁶⁰

VI. THE RIGHT TO BE FREE FROM EXTRATERRITORIAL ABDUCTION AND SOSA V. ALVAREZ-MACHAIN

A. Reconciling the Supreme Court's Decision with the Customary Norm

While there will always be difficulties for an individual seeking a domestic remedy for a breach of their international rights, such difficulties were compounded in *Sosa v. Alvarez-Machain* by the refusal of the Supreme Court to recognize the existence of the individual right. The Court's flawed analysis of customary international law not only means that individuals abducted by the United States will be unable to receive compensation for their treatment under the ATS, but more importantly, it reduces the possibility of an abductee having the prosecution against them dismissed. In the absence of a breach of sovereignty and an accompanying complaint by the host-state, the ability of an abductee to avoid prosecution depends upon the extent to which domestic courts will recognize the breach of their rights. Although United States courts have traditionally been reluctant to dismiss proceedings for a violation of international law, the Supreme Court's reasoning in *Sosa v. Alvarez-Machain* should not be adopted uncritically by courts as the basis for denying the existence of an internationally accepted right of individuals to be free from extraterritorial abduction.

While the Supreme Court concluded that Alvarez could not cite sufficient evidence to support the contention that international law recognizes a norm prohibiting the use of arbitrary detention, the Court then retreated from this position slightly, holding that any “credible invocation” of a principle against arbitrary detention requires more than a relatively brief detention.¹⁶¹ The Court indicated that for any such claim to be successful the detention must be “prolonged,”¹⁶² and that the alleged norm was therefore not applicable to Alvarez who had been transferred into the custody of lawful authorities within

160. See Costi, *supra* note 5, at 95–99 (analyzing how the right to be free from extraterritorial abduction could lead to the development of a right against prosecution).

161. *Alvarez-Machain*, 124 S.Ct. at 2768.

162. *Id.*

a day of being abducted.¹⁶³ Such a concession by the Court is not an attempt to indicate that there are occasions where extraterritorial abductions may violate customary international law, but is an attempt by the Court to take into account the respected Restatement of the Foreign Relations Law of the United States (the Restatement).¹⁶⁴

The Restatement asserts that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention."¹⁶⁵ The Restatement acknowledges that many United States courts have recognized that any form of arbitrary detention is prohibited by customary international law,¹⁶⁶ but does not provide any evidence as to why an arbitrary detention must be "prolonged." This distinction made by the Restatement has been labeled as "curious" and has been criticized as diverging from the right recognized by international treaties, state practice and domestic courts.¹⁶⁷

By taking the Restatement as being the definitive authority on the content of customary international law, the Supreme Court was able to dismiss the seriousness of Alvarez's detention by only concerning itself with the duration of Alvarez's detention. Although the irregular detention of individuals is concerning, it is the fact that individuals are being transferred between countries through an extra-legal process that is more disturbing. Rather than exclusively focusing on the length of time that an individual was arbitrarily detained, the interest of the Court should have been on what happened during that period. Not only will most abductions violate the domestic law of the host-state, but the removal of abductees from the control of the host-state deprives abductees of the ability to invoke the protection of procedural safeguards that would typically be available through any extradition process. Until abductees are brought before a court to hear the charges against them, their fate is effectively in the hands of the abductors. Abductees are likely to be subjected to various forms of physical abuse, they might be drugged, they might not be brought before a judge in an expeditious manner, they might be interrogated in the absence of a lawyer, and they might also be unable to ascertain who has abducted them and why.¹⁶⁸

The Supreme Court's contention that if customary international law prohibits arbitrary detention it does so only to the extent that such detention is prolonged, is accordingly unsound. However, this position did allow the Court

163. *Id.* at 2769.

164. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702.

165. *Id.*

166. *Id.*

167. Paust, *supra* note 12 at 563; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 345 n.67 (1994).

168. Costi, *supra* note 5, at 68.

to dismiss any international precedent that supported Alvarez's position. Although the ICJ had indicated in *The Hostages Case* that arbitrary detention violated fundamental principles of international law, the Supreme Court dismissed the attempt by Alvarez to invoke the same principles, holding that "the detention in that case was . . . far longer and harsher than Alvarez's."¹⁶⁹ If such a requirement for prolonged detention did exist it would provide little protection for individuals and could be viewed by states as permitting unlawful detentions as long as they were not lengthy. Only by focusing on the motives behind a state's actions and the overall effect of the detention on the individual can human rights law effectively provide an individual with protection against wrongful state actions.

A human rights inquiry into extraterritorial abduction should be concerned with the deliberate attempt by a state to limit the procedural protection available to an individual. International human rights law recognizes the importance of procedural protections for individuals and this is the key reason why customary international law prohibits the use of state-sponsored abduction as a means to acquire the custody of a suspected criminal. The practice of states provides no evidence that this human rights norm is entirely dependant upon the length of time that an individual is denied access to the proper legal process.

The Supreme Court's analysis would have been more convincing if it had attempted to argue that the United States was a persistent objector to the creation of an individual right to be free from extraterritorial abduction. The willingness with which the United States has used abduction as a means to acquire the custody of suspected criminals would certainly lend weight to an argument that it does not consider itself bound by any human rights norm that limits the ability to use abduction in order to seize a suspect.¹⁷⁰ However, Justice Souter for the majority failed to accommodate the persistent objector rule, and rather than using examples such as the non-self-executing declaration to the ICCPR as evidence that the United States did not adhere to such norms, the Court used these examples to deny the existence of the norm.¹⁷¹

B. Understanding the Influencing Factors on the Supreme Court

The Supreme Court's flawed view of the substance of customary international law was influenced by a number of important factors that

169. *Alvarez-Machain*, 124 S.Ct. at 2768.

170. Recent U.S. cases involving the use of extraterritorial abduction include *United States v. Lira*, 515 F.2d 68 (2d Cir. 1974); *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981); *United States v. Caro-Quintero*, 745 F.Supp. 599 (D. Cal. 1990); *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998); *Kansi v. United States*, 11 F. Supp. 2d 42 (D.C. Cir. 1998); *Yunis*, 681 F.Supp. at 896; *Noriega*, 746 F.Supp. at 1506.

171. *Alvarez-Machain*, 124 S.Ct. at 2767.

encouraged the Court to downplay the rights of an individual in Alvarez's situation. Understanding the backdrop to the decision will help to explain why the decision of the Supreme Court conflicts with international recognition of the individual right to be free from extraterritorial abduction.

The Court's examination of customary international law was almost certainly unduly influenced by the debate over the ATS. It is an indication that the facts of Alvarez's abduction were almost incidental to the issues before the Court that of the forty-nine pages in Sosa's submissions to the Court only two pages were dedicated to arguing that the respondent did not violate customary international law.¹⁷² Indeed Alvarez's own lawyer commented after the judgment that "we lost the battle in that case, but won the war on the ATS."¹⁷³ Given that the 6-3 decision of the Court to not rule out the possibility of new claims being created in the future under the ATS, the Court was in a position where it needed to dismiss Alvarez's case to placate critics of the ATS.¹⁷⁴ Not only was the bar set very high before any customary international law can become actionable under the ATS, but the judgment also indicates that there is a very high threshold before the Court will consider any norm to be considered customary international law. The Court was overly cautious in its examination of the whether Alvarez's abduction and detention violated international law for fear of opening the floodgates to litigation by foreigners. This need to reduce the number of cases being considered under the ATS has led to an artificially narrow reading of international law.

Ever since a decision of the Supreme Court in 1938 denied the existence of a federal common law,¹⁷⁵ federal courts in the United States have been wary of creating new causes of action. Although the existence of common law would allow judges to ensure that the law can appropriately take into account developments in society, for many judges this dynamic feature of the law threatens to undermine the basis of democracy by allowing courts, rather than the legislature, to create new law.¹⁷⁶ "Originalist" judges, for which Justice Scalia is the leading voice,¹⁷⁷ are of the view that to give effect to the true role of the federal judiciary the law should be viewed as static and that "an

172. Respondent's Brief, *supra* note 57.

173. Stacey Harms & Samira Puskar, *On the Docket: The Court Opens the Door to International Human Rights Cases*, MEDILL NEWS SERVICE, June 2004, available at <http://docket.medill.northwestern.edu/archives/000991print.php> (last visited Oct. 6, 2005).

174. In particular the Bush Administration had been particularly vocal against the permissive approach of judges in allowing ATS suits. Anthony Sebok, *The Alien Tort Claims Act: How Powerful a Human Rights Weapon Is It?*, FIND LAW LEGAL COMMENTARY, June 12, 2004, available at http://writ.news.findlaw.com/scripts/prINTER_friendly.pl?page=/sebok20040712.html (last visited Oct. 6, 2005).

175. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

176. Richard B. Saphire, *Commentaries: Constitutional Predispositions*, 23 DAYTON L. REV. 277, 284 (1998).

177. *Id.* at 282.

authoritative text should be understood as of the time that the text was written instead of some other time, like the present.”¹⁷⁸ It is in the framework of this ideological debate over judicial interpretation that the Supreme Court considered how the reference to the “law of nations” in the ATS should be interpreted.

To the consternation of Justice Scalia¹⁷⁹ the majority indicated that the “law of nations” was a flexible concept that should be able to accommodate changes in international law.¹⁸⁰ However, while conceding that the content of the law of nations should not be limited to the international norms existing in 1789, the Court then adopted an originalist position by maintaining that only those norms with a specificity comparable to the norms that existed when the ATS was enacted would be actionable.¹⁸¹

However, the Court then proceeded to conflate the issues of whether the norm exists under international law and whether a cause of action should be provided. The majority decision urged “restraint in judicially applying internationally generated norms,”¹⁸² but it appears that such restraint was also applied to the recognition of international norms. The Court’s reluctance to give appropriate weight to evidence of international custom was emphasized by repeatedly stressing, “the law is not so much found or discovered as it is either made or created.”¹⁸³ While this aversion to creating new law is understandable when the Court is being asked to create a cause of action, it has no place in any analysis of the substance of customary international law. Customary international law is not created through judicial recognition, but evolves over time through consistent state practice. The approach to interpreting international law is distinct from the process of applying domestic law.

It is evident that the Court was influenced by the debate over the appropriate role of judge-made law in the United States and that this issue unnecessarily affected its analysis of the content of customary international law. Justice Souter for the majority stated “we have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”¹⁸⁴ The

178. John Harrison, *Law and Truth: Panel II: Originalism and Historical Truth: Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83, 89 (2003).

179. Justice Scalia believed that the drafters of the ATS would be “terrified” at the possibility that a cause of action based on international law would be dependant on the discretion of judges. *Alvarez-Machain*, 124 S.Ct. at 2775 (Scalia, J., dissenting).

180. *Alvarez-Machain*, 124 S.Ct. at 2763.

181. *Id.* at 2761.

182. *Id.* at 2762.

183. *Id.*

184. *Id.* at 2763.

traditional reluctance of federal courts to create new causes of action has therefore been transposed to a reluctance to "seek out" new customary international law. The basis for the theory of originalism is the concern that a judge who does not stick closely to the text of a statute and the associated historical context has too much subjectivity in determining the content of the law.¹⁸⁵ Due to the unwritten nature of customary international law and the degree of discretion available to courts in recognizing norms based on state practice, the Supreme Court was accordingly wary of affirming a customary norm in the absence of Congressional approval.¹⁸⁶ The need for a "congressional mandate"¹⁸⁷ in order to affirm the existence of a customary norm indicates the reluctance of the Court to be bound by international law that the United States had not explicitly consented to. Such a stance is consistent with the notion of judicial minimalism in lawmaking, but is contrary to the principle that the existence of customary international law is not dependant on express state consent.¹⁸⁸ It is outside the scope of this paper to comment on the resistance of federal courts to creating law in the United States, but it is pertinent to comment that in *Sosa v. Alvarez-Machain* the Court's desire for legislative guidance as to whether a cause of action should be created certainly influenced its determination to deny the existence of a customary right to be free from abduction and detention.

As well as being influenced by theories on the appropriate role of the ATS, the Supreme Court's analysis of the legality of abducting and detaining an individual needs to be placed in the context of the current war on terrorism. The strong dissent in the Court of Appeals argued that by allowing Alvarez's claim to succeed the majority had "needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security."¹⁸⁹ The fear of restricting the Executive's conduct in foreign affairs certainly influenced the Supreme Court to relegate the importance of human rights in relation to national policy. The Court specifically noted that courts would have to be aware of any "collateral consequences" that a decision under the ATS may have on the Executive's exercise of discretion in foreign affairs.¹⁹⁰

The Court was not only circumspect about unduly limiting the ability of the Executive to use extraterritorial abduction in the war on terrorism, but it also had to consider the implications of its own recent decisions. On the day prior to the judgment in *Sosa v. Alvarez-Machain* being released, the Supreme Court

185. Saphire, *supra* note 176, at 285.

186. Indeed the Court indicated that it "would welcome any congressional guidance in exercising jurisdiction." *Alvarez-Machain*, 124 S.Ct. at 2765.

187. *Id.* at 2763.

188. ILA, *supra* note 70, at 38.

189. *Alvarez-Machain*, 331 F.3d at 658–59 (O'Scannlain, J., dissenting).

190. *Alvarez-Machain*, 124 S.Ct. at 2763.

released several high-profile decisions concerning the rights of those that the Executive had detained in the war on terror. When viewing these cases together it becomes apparent that any other decision by the Court in *Sosa v. Alvarez-Machain* would have serious implications for the United States government.

In *Hamdi v. Rumsfeld*, the Court held that a United States citizen seeking to challenge his classification as an enemy combatant must receive notice of the basis for his classification and be granted a fair opportunity to rebut the government's assertions before a neutral decision maker.¹⁹¹ Justice O'Connor emphasized that "history and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse of others who do not present that sort of threat."¹⁹² The importance of individuals being able to challenge their detention was also emphasized in *Rasul v. Bush* where foreigners being held at Guantanamo Bay were granted the right to test the legality of their detention before federal courts.¹⁹³ While these two decisions can be seen as upholding international law by limiting the right of a government to indefinitely detain individuals without access to courts, why then did the Court seemingly counter this the very next day by holding that there was no right under international law to be free from arbitrary detention?

A primary policy reason for the approach of the Supreme Court stems from the implications of allowing hundreds of individuals detained by the United States military to challenge their detention: domestic courts would be required to rule whether an individual's continued detention is justified or whether an individual is being arbitrarily detained. A conclusion that an individual's detention is unwarranted and arbitrary could therefore not only lead to that individual's release but also to the possibility of civil claims being initiated under the ATS. This concerned the minority in the Court of Appeals,¹⁹⁴ and would have also influenced the Supreme Court's decision to read-down the status of international law on the issue of arbitrary detention of transnational abductees.

The decision in *Sosa v. Alvarez-Machain* has to be read in conjunction with these earlier decisions. Although the Court took a stand against the government by allowing Guantanamo detainees to challenge their detention, the decision in *Sosa v. Alvarez-Machain* duly limited the repercussions for the government. A decision that an arbitrary detention could lead to civil damages would have

191. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

192. *Id.* at 2657.

193. *Rasul v. Bush*, 124 S.Ct. 2686 (2004).

194. Judge O'Scannlain noted that, "the majority has left the door open for the objects of our international war on terrorism to do the same [as Alvarez] I believe that impermissibly encroaching upon the duties rightfully reserved to the political branches is of serious consequence, and unfortunately such encroachment establishes a very troubling precedent which we will regret." *Alvarez-Machain*, 331 F.3d at 645 (O'Scannlain, J., dissenting).

dramatically undermined the current Administration's treatment of terrorist suspects and the Court may have been seen as encouraging the detainees to bring suits the day after allowing them to challenge their detentions. The importance of limiting the ability of individuals detained in the Government's war on terrorism to file civil suits was underscored by the fact that the government required Yaser Hamdi to waive any right to sue the United States over his captivity before releasing him.¹⁹⁵

The Supreme Court's inadequate analysis of customary international law protecting individuals from state-sponsored abductions can only be understood in light of the cumulative effect that the aforementioned factors had on the Court. Concerns over judicial law-making, the need to limit the scope of the ATS, the desire not to restrict the Executive's actions, and the possible implications that any contrary decision would have for the detainees of the United States in the war on terrorism compounded the Court's reluctance to consider itself bound by an international norm that the United States had not expressly consented to be bound by. These considerations all contributed to the Court's decision to read-down customary international law and not to recognize right of individuals not to be subjected to extraterritorial abduction.

VII. CONCLUSION

Over the last sixty years the international legal system has aimed to ensure peace and security through inter-state co-operation and by encouraging respect for human rights.¹⁹⁶ Extradition procedures provide a means for respecting state boundaries and ensuring procedural safeguards for individuals, while also combating the impunity of offenders that occurs when a suspect resides outside a state that is seeking their protection. However, extradition is not a feasible option when the host-state is unwilling or unable to co-operate. In such situations states may resort to extra-legal methods in order to facilitate the prosecution of suspects. The abduction, detention and forcible transfer of individuals by state authorities challenges the foundation of the international legal system by disregarding principles of state sovereignty and human rights.

In the absence of consent by the host-state, any attempt by the prosecuting state to acquire custody of the suspect by conducting operations within the host-state's territory violates international law. While such abductions are widely recognized as breaching international law protecting the territorial integrity of

195. Although there are thoughts that such an agreement could be invalidated on grounds of duress. See Michael C. Dorf, *Have We Heard the Last of Yaser Hamdi? Why his Promise Not to Sue the Government May not be Binding*, FIND LAW LEGAL COMMENTARY, Sep. 29, 2004, available at http://writ.news.findlaw.com/scripts/prINTER_friendly.pl?page=/dorf/20040929.html (last visited Oct. 6, 2005).

196. See U.N. CHARTER art. 1, para. 3.

the state,¹⁹⁷ they also breach the right of an individual to be free from extraterritorial abduction. The basis of this right stems from the absence of procedural protections available to an abductee and the deliberate attempt by the abducting state to disregard the procedural safeguards available to the individual under the domestic law of the host state. This individual right exists independently from a breach of a state's sovereignty and can therefore be invoked by an individual in situations when the host-state is complicit in the abduction. The right of individuals not to be subjected to state-sponsored abductions has clearly evolved through state practice under the United Nations Charter, the Universal Declaration of Human Rights, the ICCPR and the European Convention on Human Rights. These international instruments have helped to provide sufficiently uniform state practice and *opinio juris* for the right to become universally binding under customary international law.

Yet, when the United States Supreme Court in *Sosa v. Alvarez-Machain* recently had an opportunity to affirm the existence of this norm, it declared that there was scant evidence that the alleged norm was part of customary international law.¹⁹⁸ This paper has demonstrated that the Court was motivated by a need to restrict future claims under the ATS, was hesitant to recognize the existence of a customary international law norm without legislative direction, was influenced by the reluctance of the United States to adhere to the norm, and was wary of the effect that any contrary decision could have on the ability of the Executive in the war on terrorism.

These considerations, which are irrelevant to determining the content of customary international law, prompted the Court to reach a conclusion that unnecessarily relegates the importance of human rights norms. The implication of denying the existence of an international right protecting individuals from being abducted and detained by states is that abductees would be dependant upon the willingness of a state to advance a claim on their behalf. Such an outcome is unappealing. The recognition of the right of individuals to be free from extraterritorial abduction is consistent with the development of human rights law over the last sixty years and the increasing recognition of individuals as distinct actors in the international legal system.

197. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432; BASSIOUNI, *supra* note 3, at 252; OPPENHEIM, *supra* note 4, at 295.

198. *Alvarez-Machain*, 124 S.Ct. at 2768.

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IN THE INTERNATIONAL COURT OF JUSTICE

THE CASE CONCERNING THE VESSEL
THE MAIRI MARU

Republic of Appollonia
Applicant

v.

Kingdom of Raglan
Respondent

MEMORIAL FOR THE APPLICANT

THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

Universidad Catolica Andres Bello, Venezuela

CASE CONCERNING THE VESSEL THE MAIRI MARU

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I. STATEMENT OF FACTS

In April of 2001, an agreement was entered into between Appollonia (Applicant) and Maguffin (not party to this case) for the exportation of MOX, produced by an Appollonian State-owned power plant. Since then, Appollonia has exported MOX to Maguffin via shipments traveling through the waters of Raglan (Respondent), located halfway between Appollonia and Maguffin.

Between 1995 and 1999, international organizations issued warnings regarding the danger that pirate activity in the area surrounding Raglanian waters could represent to ships. The IAEA determined that Appollonia's shipment of MOX was in compliance with international standards.

In October 1999, Raglan put into practice an anti-piracy program in order to guarantee the safety of the ships traveling through its waters reducing the risk

associated with shipping in the region. In November 2001, Raglan began using private contractors to serve as pilots since the Raglanian Navy was no longer able to provide the escorting service to all incoming ships.

On July 26 2002, *The Mairi Maru*, a privately owned Appollonian-flagged vessel headed for Maguffin and laden with MOX, requested an escort in accordance with the requirements of Raglan's anti-piracy program. The vessel was boarded by the assigned pilot, Good and two of his assistants.

Hours later, Good threatened the crew and locked them in the ship's galley. Good and his confederates removed the navigation and communication equipment disabling the vessel, making it impossible to steer. They disembarked the ship, leaving it adrift on a course toward international waters.

On July, 28 an intense storm altered the course of *The Mairi Maru* which ran aground on the Norton Shallows causing damage to the ship's hull resulting in the leakage of MOX pellets in the surrounding waters. Hours later, the Raglanian Royal Navy rescued the surviving crew members.

Diplomatic notes and official statements were exchanged between July 31 and August 2 of that same year, in which Raglan and Appollonia, respectively, denied responsibility for the damages caused. Appollonia pointed out that Good was an agent of Raglan, and was responsible due to its failure to police its waters for pirate activities. Raglan denied responsibility under the presumption that MOX was being shipped illegally.

On August 4, Raglan sent a diplomatic note to Appollonia informing it of the decision to scuttle *The Mairi Maru*. Later that week, the vessel was scuttled with the remaining MOX onboard.

The following week, diplomatic notes were exchanged. Raglan alleged Appollonia had violated its duties as an exporter of MOX under the guidelines of the IAEA, and Appollonia pointed out that Raglan had violated anti-dumping provisions.

In October 2002, the owners and insurers of *The Mairi Maru* and the members and families of the crew that had died initiated lawsuits in Raglan for their respective losses. These claims were taken to Raglan's maximum judicial authority without avail.

On April 5 2003, the legislative enactment, *COMMA*, which recited the events surrounding the attack on *The Mairi Maru* was signed into law. In July, both parties agreed to submit their differences to the ICJ.

II. STATEMENT OF JURISDICTION

The Republic of Appollonia and the Kingdom of Raglan have submitted by Special Agreement their differences concerning the Vessel *The Mairi Maru*, and transmitted a copy thereof to the Registrar of the Court pursuant to article

40(1) of the Statute. Therefore, both parties have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute of the Court.

III. SUMMARY OF PLEADINGS

- A. The Court should declare that Raglan is responsible for the attack upon and wreck of *The Mairi Maru* since (i) the acts of Good are attributable to Raglan; and (ii) Raglan failed to respond appropriately to pirate activities in its waters. Firstly, the attack on *The Mairi Maru* does not constitute piracy *jure gentium* and Good was acting as an empowered agent of Raglan, thus his acts are attributable to Raglan under customary law. Secondly, Raglan had the obligation of protecting Appollonians and their property from harm within its jurisdiction, clearly failing to do so. Even if this Court were to decide that the attack constitutes piracy *jure gentium*, Raglan had the obligation of repressing piracy and failed to do so. Accordingly, Raglan owes compensation to Appollonia for the attack upon and wreck of *The Mairi Maru*.
- B. Raglan violated international law by scuttling *The Mairi Maru*. Firstly, the scuttling was a violation of the principle of flag state jurisdiction and there exists no rule under customary international law that would have allowed Raglan to scuttle the vessel. Secondly, Raglan has breached customary rules prohibiting the dumping of radioactive waste by scuttling the vessel with MOX onboard. Thirdly, a state of necessity cannot be alleged in the present case as (i) scuttling was not the only means available to Raglan and (ii) Raglan contributed to the alleged state of necessity. Accordingly, compensation is owed for the loss of *The Mairi Maru* and the remaining MOX.
- C. This Court should find that Appollonia's shipment of MOX was lawful under international law since the right of archipelagic sea lane passage applies to all ships, and hence is applicable in this case. Additionally, Appollonia was not bound to notify Raglan of its shipment since there is no treaty in force between both parties in this regard, and in any case the obligation to notify is not a rule of customary international law. Moreover, the Precautionary Principle was not breached since Appollonia complied with international standards pertaining to the shipment of MOX and the non-notification of the MOX shipments was indeed a precautionary measure. Alternatively, Raglan cannot contest the shipment of MOX as it acquiesced to the shipments formulating no protest to recurrent shipment of MOX through its waters.

- D. Raglan's claim in this case is inadmissible since remedies were not exhausted. In any case, Raglan does not have standing to seek compensation for acts that occurred outside its jurisdiction as its legal interests have not been affected nor does its right to exercise freedom on the high seas grant it standing. Additionally, Appollonia bears no responsibility for the damage caused to the Norton Shallows since it may not be subject to the strict liability doctrine, which only applies when accorded under a treaty, and in any event, the damage may not be attributed to Appollonia's shipment of MOX as a proximate cause. Even if found responsible, Appollonia would not owe Raglan compensation since the losses it claims are not subject to compensation and additionally Raglan's contributory negligence shall in any case reduce the amount to be paid.

IV. QUESTIONS PRESENTED

- A. Whether the acts of Thomas Good and Raglan's failed efforts to respond appropriately to pirate activities in its waters make Raglan responsible for the wreck of *The Mairi Maru* and all consequences thereof;
- B. Whether the scuttling of *The Mairi Maru* is illegal and whether this act would entail an obligation to pay compensation for the loss of *The Mairi Maru* and the MOX;
- C. Whether Appollonia violated obligations owed to Raglan under international law in transporting MOX through Raglanian waters; and
- D. Whether Raglan would have standing to seek compensation for economic losses resulting from acts that occurred outside its territorial waters and exclusive economic zone.

V. PLEADINGS

A. Raglan is responsible for the attack upon and wreck of The Mairi Maru and all consequences thereof by virtue of (1) its failure to respond appropriately to pirate activities in its archipelagic waters and (2) the acts of Thomas Good, which are imputable to Raglan

1. Appollonia's Claim Is Admissible Since Local Remedies Have Been Exhausted

For a claim to be admissible before an international court, the alien on whose behalf the claim is brought must have pursued the essence of the claim

as far as permitted by the local law of the state that committed injury,¹ as recognized in international treaties and decisions.²

In this case, Appollonians injured by the attack upon and wreck of *The Mairi Maru* pursued until the court of last resort, without avail, a claim seeking compensation for Raglan's responsibility for such events, exhausting local remedies. Thus, Appollonia has the right to invoke the responsibility of Raglan and seek compensation on behalf of its nationals.

2. Raglan Is Responsible For The Illegal Acts Of Good

International responsibility of a state arises from acts which (i) are attributable to that state, and (ii) constitute a breach of its international obligations.³ The acts of Good fulfill both of these requirements, as proven *infra*.

i. The Acts of Good are Attributable to Raglan

a. The acts of Good do not constitute piracy *jure gentium*

Raglan may attempt to elude responsibility for Good's acts by claiming that they constitute acts of piracy *jure gentium*, which may not be attributable to any state.⁴ Piracy *jure gentium* may consist of any illegal act of violence or depredation, committed for private ends by crew or passengers of a private ship on the high seas⁵ against another ship, or against persons or property on board

1. IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 497 (5th ed. 1998); International Law Commission, *Draft Articles, Responsibility of States for Internationally Wrongful Acts*, art. 44, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter *Draft Articles*].

2. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 182 [hereinafter ICCPR]; *Electronica Sicula Spa Case* (U.S. v. Italy), 1989 I.C.J. 15 (July 20); American Convention on Human Rights: "Pact of San José, Costa Rica", art. 46(1)(a), July 18, 1978, 1144 U.N.T.S. 155 [hereinafter ACHR]; The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Sept. 1953, 213 U.N.T.S. 222 [hereinafter ECHR]; Organization of African Unity: Banjul Charter on Human and People's Rights, art. 56(c), June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter AFCR]; Finnish Ships Arbitration (U.K. v. Finn.), 2 R. Int'l Arb. Awards 1479 (Perm. Ct. Arb. 1934).

3. *Phosphates in Morocco*, 1938 P.C.I.J. (ser. C) No. 84, at 28 (1938); *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 23 (Dec. 24).

4. *S.S. Lotus Case*, Moore Dissenting Opinion, 1927 P.C.I.J. (ser. A) No. 10, at 71 (Sept. 7); Robert Reuland, *Interference With Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1188 (1989); Rohn Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 VAND. J. TRANSNAT'L L. 47, 50 (1988).

5. LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 105 (1992); BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42 (1980); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdictions Hollow Foundation*, 45 HARV. INT'L L.J. 183, 191 (2004).

such ship.⁶ The customary character of this definition derives from national decisions⁷ and its inclusion in treaties⁸ and legislation.⁹

Based on the above definition, piratical attacks occurring within the territorial waters of a state are not deemed piracy *jure gentium*.¹⁰ For instance, in *US v. Smith*¹¹ the US Supreme Court condemned Thomas Smith and others, for piracy *jure gentium*, because the acts of plunder against the Spanish vessel were committed on the high seas. In this case, *The Mairi Maru* entered Raglanian archipelagic waters at 2200 hours and at 2300 hours Good threatened the Captain with an explosive device and took control of the vessel. He then committed robbery, disabled the aft propeller shaft, and disembarked *The Mairi Maru*, all within Raglanian waters. Thus, the acts of violence and depredation in this case occurred within Raglanian waters, and not on the high seas.

b. Good is an empowered agent of Raglan

It is a general principle of law that states can only act through agents and representatives.¹² This means that conduct of persons empowered to exercise

6. Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 109-10 (2000); George P. Smith II, *From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT'L L. 277, 300 (1989).

7. John Castle and Nederlandse Stichting Sirius v. N.V. Parfin, 77 I.L.R. 537-9 (Dec. 19, 1986); Starkle, *Piraterie en Haute Mer et Compétente Pénale. A propos de l'arrêt de la Cour d'appel d'Anvers du 19 juillet 1985*, RDPC soixante-septième année (1987), núm. 8-9-10, Août, Septembre, Octobre 1987, p. 738-41.

8. U.N. Convention on the Law of the Sea, Nov. 16, 1994, 1833 U.N.T.S. 397, 436 [hereinafter UNCLOS]; Geneva Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82 [hereinafter Geneva Convention].

9. 18 U.S.C. § 1651 (2000); Territorial Waters Judicial Act, 1878, c. 73, § 6 (entered into force, Feb. 1, 1991) (Eng.); Merchant Shipping and Maritime Security Act, 1997, c. 28 § 26 (entered into force, July 17, 1997) (Eng.); Canada Criminal Code, 46, §74(1); CYPRUS CONSTITUTION, art. 7, para. 2 (1960); Cypress Criminal Code § 69, Código de Bustamante, 1932, art. 308; Código Penal de Venezuela (Penal Code of Venezuela), art. 4(9) & 153 (2000), available at <http://comunidad.derecho.org/pantin/codigopenal.html>; Código Penal de Argentina (Penal Code of Argentina), art. 198, available at http://www.justiniano.com/codigos_juridicos/codigo_penal.htm; Laws of the Gilbert Islands Penal Code, ch. 67, §63, available at http://www.pacii.org/ki/legis/consol_act/pc66/; Cook Islands Crimes Act 1969, part V, §103, available at http://www.pacii.org/ck/legis/num_act/ca196982/; South Africa Defense Act 42 of 2002, §24, reprinted in Government Gazette, Republic of South Africa, Vol. 452 at p.30 (Feb. 2003).

10. Phillip Buhler, *New Struggle with an Old Menace: Towards A Revised Definition of Maritime Policy*, 8-WTR CURRENTS: INT'L TRADE L.J. 61, 65 (1999); Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 264 (2002); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 191 (2004).

11. *U.S. v. Smith*, 18 U.S. 153 (1820).

12. Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court, Advisory Opinion, 1923 P.C.I.J. (ser. C) No. 3, at 22 (June 15- Sept. 15); OPPENHEIM'S INTERNATIONAL LAW, 9TH Edition (Sir Robert Jennings & Sir Author Watts eds., 1996).

elements of governmental authority acting in such capacity, are attributable to the state even if the persons acted in excess of authority or contrary to instructions.¹³ Indeed, when states offer public piloting services, the individuals performing them are deemed state agents exercising public prerogatives.¹⁴

To identify an individual empowered to exercise elements of governmental authority the following must be examined (i) if the functions have been normally exercised by state organs;¹⁵ (ii) how they were conferred on the person;¹⁶ (iii) the purposes for which they were exercised; and (iv) the extent of the person's accountability *vis-à-vis* the government.¹⁷

The above conditions were met in this case since (i) Good was empowered by the Raglanian Royal Navy (RRN) to carry out official functions normally exercised by Raglanian naval officers; (ii) powers were conferred through a contract between him and Raglan, made official by its Prime-Minister, delegating public functions normally exercised by the RRN; (iii) powers granted to him through the anti-piracy program are part of national defense activities; and (iv) private contractors were accountable as they responded directly to the RRN.

Furthermore, states may be responsible for unauthorized acts and omissions of organs or agents committed with apparent authority¹⁸ -as recognized by international decisions and publicists¹⁹ or in use of means placed at their disposition by such authority,²⁰ even if the individual concerned has

13. Claire Finkelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261, 278 (1995); *Draft Articles*, *supra* note 1, art. 7.

14. NATIONAL RESEARCH COUNCIL, MINDING THE HELM, MARINE NAVIGATION AND PILOTING 408 (1994); GOVT. OF HONG KONG, SPECIAL ADMINISTRATIVE REGION, MARINE DEPARTMENT, MARITIME SERVICES (2005), http://www.mardep.gov.hk/en/pub_services/ocean/pilot.html; PORT OF SÈTE MARITIME DOCKING SERVICES, PILOTING KNOWLEDGE: THE JOB OF A PILOT (2005), http://www.sete.port.fr/partenaires_en/pilotage.php; CYPRUS PORT AUTHORITY, MARITIME SERVICES (2005), <http://www.cpa.gov.cy/>.

15. Santiago Villalpando, Article, *Attribution of Conduct to the Estate: How the Rules of State Responsibility May be Applied Within the WTO Dispute Settlement System*, 5 J. INT'L ECON. L. 393, 403 (2002).

16. Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize A Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296 (2002); IAN BROWNLEE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 136 (1983).

17. See Villalpando, *supra* note 15, at 403; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSIONS ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 101 (2002).

18. Claire Claim (Fr. v. Mex.), 5 R. Int'l Arb. Awards 516, 530 (Perm. Ct. Arb. 1929); Sandline International, Inc./Papua New Guinea Arbitration, 117 I.L.R. 552, 561 (1998).

19. Velasquez Rodriguez Case, 1988 Inter-Am. C.H.R. (ser. C) No.4 (July 29, 1988); DERECHO INTERNACIONAL PUBLICO, RESPONSABILIDAD INTERNACIONAL IN MANUAL DE DERECHO INTERNACIONAL PUBLICO 519, 519-21 (Sorenson ed. 1992).

20. Youmans Claim (U.S. v. Mex.) 4 R. Int'l Arb. Awards 110, 116 (Perm. Ct. Arb. 1926); Mallen Case (Mex. v. U.S.), 4 R. Int'l Arb. Awards 173, 177 (Perm. Ct. Arb. 1927).

overtly committed unlawful acts under the cover of its official status.²¹ Indeed, in *Youmans Claim*,²² Mexico was found responsible for the acts of troops sent to protect aliens, but which in contravention of instructions and outside the scope of their competence, joined the attackers killing the aliens they had to protect. The same reasoning applies to this case, since Good boarded the ship as planned and through a privately-owned vessel regularly employed by Raglan for that purpose; brought the specially-designed flag of Raglanian naval protection, which was flown on *The Mairi Maru*; and seemingly performed the piloting of the vessel without perceivable irregularities, until he threatened the Captain for control of the ship. Thus, he clearly acted within the apparent authority of a Raglanian agent deployed to pilot the vessel.

As regards the means put at his disposal, in *Mallen*²³ the Commission found that an officer showing his badge evidences that he is acting in an official capacity. In this case, Good, by virtue of the authority assigned to him as a pilot, was able to board the vessel and commit robbery.

Therefore, Good's acts are attributable to Raglan since (i) he was empowered by Raglan to exercise elements of governmental authority, and (ii) he acted within the apparent authority conferred to him by Raglan.

ii. *Raglan Breached Its International Obligation Of Abstaining From Causing Harm To Foreign Citizens And/Or Their Property*

States have the obligation to abstain from ill-treating directly, or through their agents, foreign nationals in their territory.²⁴ The customary character of this rule is evidenced by its recognition in various instruments²⁵ and international decisions,²⁶ encompassing also a duty of abstention from physical harm or destruction of property.²⁷ As shown *infra*, Good -acting as agent of

21. Draft Articles, *supra* note 1, art. 10 commentary, reprinted in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (1998), at 505; Crawford, *supra* note _Ref112730962\h * MERGEFORMAT 17, 107.

22. *Youmans Claim*, *supra* note _Ref112730994\h * MERGEFORMAT 20, at 110-6.

23. *Mallen Case*, *supra* note _Ref112730994\h * MERGEFORMAT 20, at 173-177.

24. Giuseppe Sperduti, *Responsibility of States for Activities of Private Law Persons*, 10 ENCYCLOPEDIA OF PUB. INT'L L. 373 (1987).

25. U.N. Declaration of Human Rights, art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); American Declaration of the Rights; 18579; 18579 and Duties; 18581; 18581 of Man; 18583; 18583, art. I and XXIII, O.A.S. Official Rec., OEA/ser.L/V./II.23, doc.21 rev.6 (1948); ICCPR, *supra* note _Ref112730669\h * MERGEFORMAT 2, art. 6(1); ECHR, *supra* note _Ref112730669\h * MERGEFORMAT 2, Art. 2; ACHR, *supra* note _Ref112730669\h * MERGEFORMAT 2, Art. 4(1) and 21; AFHR, *supra* note _Ref112730669\h * MERGEFORMAT 2, art. 4, 14 & 29.

26. See generally, *Roberts Claim* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 77 (Perm. Ct. Arb. 1926); *Youmans Claim*, *supra* note 20.

27. R. Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 1980 GERM.Y.B. INT'L L. 22, 35.

Raglan- caused the wreck of *The Mairi Maru*, Appollonian property, and the death and severe illness of innocent Appollonians. Therefore Raglan, through Good's actions, breached its duty of not causing harm and is responsible for the injury caused.

3. Raglan Failed To Respond Appropriately To Pirate Activities In Its Archipelagic Waters

Irrespective of whether the acts of Good are attributable to Raglan, Raglan is responsible for the attack upon and the wreck of *The Mairi Maru*, due to its failure to respond appropriately to pirate activities in its waters.

States have a duty to protect other states and their nationals against injurious acts by individuals within their jurisdiction,²⁸ with a correlative duty to (i) prevent injury, and (ii) punish wrongdoers.²⁹ This rule's customary character is evidenced by international decisions, national decisions and legislation,³⁰ as well as governmental statements.³¹ States shall pay damages if they fail to exercise due diligence in discharging such duties.³²

i. Raglan failed to prevent harm being caused to Appollonians and their Property

Even the utmost efforts of a state may result insufficient if it fails to measure up to a minimum international standard in its duty to prevent.³³ Indeed, in *Neer* the Tribunal held that the treatment of aliens breaches international law when

28. Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1038, 1963 (Perm. Ct. Arb. 1935); Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 831 (Perm. Ct. Arb. 1925); *Electronica Sicula*, *supra* note 2, at 15; Lillich and Paxmann, State Responsibility for Injuries to Aliens Occasioned by Terrorist Attacks, 26 AM. U. L. REV., 1997, 225-30

29. Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 324 (1991); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 1928, 87-89; Pisillo-Mazzeschi, *supra* note 2, Ref112731242\h * MERGEFORMAT 27, 22-26.

30. Morissette v. U.S., 342 U.S. 246 (1952); U.S. v. Arizona, 120 U.S. 479 (1887); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 711 (1987); CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES 268-320 (JEROME ALAN COHEN ED. HARV. UNIV. PRESS 1972); JEROME A. COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 828 (1974).

31. Note from U.S. Secretary of State regarding the Negrete Affair (Mar. 19, 1923), in A DIGEST OF INTERNATIONAL LAW, at 961 (John B. Moore ed., 1906)[hereinafter DIGEST OF INTERNATIONAL LAW]; BROWNLIE, *supra* note 16, at 135; Diplomatic Note from the Italian Minister of Foreign Affairs to the U.S. (Jan. 28, 1927), in DIGEST OF INTERNATIONAL LAW, VOL. V (Green H. Hackworth ed., 1943), at 659-60.

32. Christina E. Sorenson, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 217 (1990).

33. George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 214-15 (Richard B. Lillich ed. 1983); *Neer Case* (U.S. v. Mex.), 4 R. Int'l Arb. Awards 60, 61 (Perm. Ct. Arb. 1926).

governmental action is below international standards, allowing any reasonable and impartial man to recognize its insufficiency.³⁴

In this case, Raglan, despite the measures taken through the so-called anti-piracy program, clearly failed to meet the minimum international standards since: (i) the screening of the civilian pilots was so inefficient that the civilians hired, carried out the attacks they were assigned to prevent, and (ii) the piloting of *The Mairi Maru* should have been electronically monitored by the RRN, according to the anti-piracy program, yet when the ship was steered out of the sea lanes designated by Raglan for international navigation, the RRN took no action to investigate such deviation.

Raglan cannot claim that it was incapable of employing more efforts, since states are presumed to have the power of fulfilling their international obligations, and may be held responsible for failing in their duties, even if they are incapable of performing them.³⁵ For instance, in *Montijo*,³⁶ the arbitrator held that where states promise protection to those they admit to their territory, they must find the means of making it effective. Hence, Raglan may not justify its impossibility to fully protect Appollonians and their property after it promised such protection.

*ii. Raglan failed to exercise due diligence in apprehending
and punishing the wrongdoers*

International standards demand that governmental authorities take affirmative actions to investigate and apprehend wrongdoers.³⁷ For instance, in *Janes*,³⁸ the Mexican government was found liable for not having diligently pursued and properly punishing the offender. In this case, Raglan has neither located nor apprehended Good, nor is there evidence whatsoever that any measures have been taken to such effect, evidencing either unwillingness to apprehend Good, or undue delay, failing to exercise due diligence in its duty to apprehend and prosecute Good and his confederates.

34. *Neer Case*, *supra* note _Ref112731282\h * MERGEFORMAT 33, at 61-2.

35. DIGEST OF INTERNATIONAL LAW, *supra* note 31, at 973-74 (discussing the *Montijo Case* (Colom. v. U.S.), July 26, 1875)); Eagleton, *supra* note _Ref112731362\h * MERGEFORMAT 29, at 90.

36. DIGEST OF INTERNATIONAL LAW, *supra* note 31, at 973-74.

37. *Janes Case* (U.S. v. Mex), 4 R. Int'l Arb. Awards 82, 87 (Perm. Ct. Arb. 1926); Jimmy Gurule, Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad, 17 HASTINGS INT'L L. REV. 457, 474 (1994); CHITTHARANJAN FELIX AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS, 1967, 54.

38. *Janes Case*, *supra* note _Ref112731420\h * MERGEFORMAT 37, at 87.

4. In The Alternative, If This Court Considers The Acts Of Thomas Good To Be Piracy *Jure Gentium*, Raglan Failed Its Duty To Repress Piracy

Under emerging customary law states must cooperate for the repression of piracy.³⁹ This is evidenced by the inclusion of this rule in international instruments,⁴⁰ regional agreements,⁴¹ UN Resolutions,⁴² national decisions and legislation,⁴³ and governmental statements.⁴⁴ Indeed, the International Law Commission ("ILC") stated that states having an opportunity of taking measures against piracy, and neglecting to do so, would be failing their duty.⁴⁵ Furthermore, when the prohibition of a certain offense attains the status of *jus cogens*, such as in the case of piracy,⁴⁶ it imposes on all states a duty to act to suppress it.⁴⁷

39. Jacob W.F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337 (1970); AIR POWER DEVELOPMENT CENTRE, APP1003 OPERATIONS LAW FOR RAAF COMMANDERS USE OF FORCE IN PEACETIME (2004), <http://www.raaf.gov.au/airpower/html/doctrine/aap1003-main.asp> (last visited Oct. 6, 2005); Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems With an Old Enemy*, 20 TUL. MAR. L.J. 293, 306 (1996).

40. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 13, March 1, 1992, 1678 U.N.T.S. 222.

41. Agreement Among the Governments of the Black Sea Economic Cooperation Participating Status on Cooperation In Combating Crime, In Particular In Its Organized Forms, in force Mar. 2003, art. 1 (BSEC) in 10 L. AND BUS. REV. AM. 631 (2004); Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, April 28, 2005, 44 I.L.M. 829.

42. G.A. Res. 56/37, ¶ 5, U.N. Doc. A/56/58/Add.1 (Oct. 5, 2001); UNITED NATIONS, OCEANS: THE LIFELINE OF OUR PLANET ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: 20 YEARS OF LAW AND ORDER ON THE OCEANS AND SEAS (1982-2002), PEACE AND SECURITY FOR THE OCEANS AND SEAS, ¶ 1, http://www.un.org/depts/105/convention_agreements/ (last visited Oct. 6, 2005);

43. U.S. v. Kintock, 18 U.S. 144, 148 (1820); U.S. v. Palmer, 16 U.S. 610, 620 (1818); 33 U.S.C. § 381 (2000); CONST. (1975), Art. 35, § 1(b)(vi) (Papua N.G.); Hong Kong Regulations, Cap. 200-A, Suppression of Piracy Regulations, <http://www.legislation.gov.hk/eng/home.htm>.

44. Maureen O'C Walker, U.S. Department of State, Acting Deputy Director, Office of Oceans Affairs, Statement to the U.N. Open-Ended Informal Consultative Process on Oceans and Law of the Sea (May 10, 2001), <http://www.state.gov/g/oes/rls/rm/4994.htm>; Liu Zhenmin, Head of Delegation of China, Statement to Panel B of the Second Meeting of The United Nations Opened Informal Consultative Process on Oceans and the Law of the Sea (2005), <http://www.china-un.org/eng/zghlhg/flsw/t28537.htm>; JAPAN MINISTRY OF FOREIGN AFFAIRS, EFFORTS IN GLOBAL ISSUES, SUSTAINABLE DEVELOPMENT AND GLOBAL ENVIRONMENT ISSUES (2005), <http://www.mofa.go.jp/policy/other/bluebook/2003/chap3-c.pdf> (last visited Oct. 6, 2005).

45. *Commentary ILC's Draft Article*, [1956] 38 Y.B. Int'l L. Comm'n 282, UN Doc. A/CN.4/SER.A/1956/Add.1; *Harvard Draft Convention on Piracy*, 26 AM. J. INT'L L. SUPP. 743 art. 2 (1932).

46. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59-AUT LAW & CONTEMP. PROBS. 63, 68 (1996).

47. Ian Patrick Barry, *The Right to Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 327 (2004); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 107-8 (2001); Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1967).

Positioning naval units in piracy-prone regions has proven the only effective method to combat piracy.⁴⁸ For example, the US uses its Navy for high seas law enforcement and suppression of piracy,⁴⁹ and attacks on Russian vessels in the East China Sea ceased when Moscow deployed a naval flotilla.⁵⁰ Accordingly, in the five piracy-prone regions of the world (Far East, South America and the Caribbean, the Indian Ocean, West Africa, and East Africa),⁵¹ affected states employ naval patrols to combat piracy.⁵² Thus, states affected by piracy have employed resources available to combat piracy, implementing effective naval patrols in their waters and on the high seas. In this case, Raglan solely applied a deficient piloting system in its waters that evidently fails to provide appropriate protection. Therefore, Raglan did not fulfill its duty to repress piracy, being no evidence that it invested any efforts to apprehend and prosecute Good and his assistants.

5. Raglan Owes Compensation To Appollonia For The Attack Upon And Wreck Of The Mairi Maru And All Consequences Thereof

A state responsible for an internationally wrongful act, which damage cannot be made good by restitution, owes compensation for the financially assessable damage caused.⁵³ As proven *supra*, Raglan is responsible for the attack and wreck of *The Mairi Maru* and all consequences thereof. Therefore, this Court must award compensation for said losses.

48. Michael Vatikiotis, *Gunboat Diplomacy*, in FAR E. ECON. REV. p. 24 (Jun. 16, 1994); Timothy H. Goodman, *Leaving the Corsair's Name to Other Times: "How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements"*, 31 CASE W. RES. J. INT'L L. 139, 164 (1999); The Pirates That Hollywood Does Not Portray, Lloyd's List, Nov. 27, 1995.

49. Terrence Fokas, *The Barbary Coast Revisited: The Resurgence of International Maritime Piracy*, 9 U.S.F. MAR. L.J. 427, 460 (1997); Christopher A. Abel, *Not Fit For Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 477 (1990);

50. Vatikiotis, *supra* note _Ref112731441\h * MERGEFORMAT 48, at 24.

51. INTERNATIONAL MARITIME ORGANIZATION, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS ¶ 1, 5 (2003).

52. Beckman *et al.*, Acts of Piracy in the Malacca and Singapore Straits, 1 IBRU MARITIME BRIEFING 1994, 16; Piracy and Armed Robbery Against Ships, Piracy Reporting Centre, Report of Jan.-June 30, 1998, 1; Mark Colvin, *PM - Joint Anti-Piracy Patrols of the Straits of Malacca*, July 20, 2004, ABC ONLINE, <http://www.abc.net.au/pm/content/2004/s1158181.htm>; Mitsui O.S.K. Lines, *Japanese Coast Guard and Philippine Coast Guard Hold Drill to Combat Terrorism, Piracy*, Dec. 21, 2004), <http://www.mol.co.jp/menu-e.shtml> (last visited Oct. 6, 2005).

53. Case Concerning the Factory at Chorzow, 1927 P.C.I.J. (ser. A) No. 12, at 49 (Nov. 21); Corfu Channel Case, Merits, 1949 I.C.J. 4, 49 (Apr. 9).

B. Raglan is responsible for the loss of the Mairi Maru and the Mox and other cargo that she carried, because its scuttling of the vessel was illegal, and therefore owes compensation to Appollonia on behalf of its citizens who suffered direct financial and other losses.

1. Raglan Violated International Law By Scuttling The Mairi Maru

i. Pursuant to the Rule of Flag-State Jurisdiction the Scuttling of The Mairi Maru was in Violation of International Law

It is a general principle of law and a pillar of the freedom of the high seas⁵⁴ that vessels on the high seas are only subject to the authority of the state whose flag they fly, precluding other states from exercising jurisdiction without prior consent.⁵⁵ Accordingly, when maritime casualties occur, affected states must notify the flag state,⁵⁶ as without prior consent, only the flag state may intervene.⁵⁷ In this case, Raglan made no effort to seek prior consent or consult Appollonia before scuttling, simply sending a diplomatic note the day before the action was taken, to inform Appollonia its intention to scuttle the vessel, violating the flag state jurisdiction principle.

ii. Intervention to Prevent, Mitigate and Eliminate a Grave and Imminent Danger to a State's Essential Interest cannot be accepted Under Customary International Law

Raglan may claim that when a maritime casualty occurs on the high seas, the threatened state may intervene to eliminate, prevent and mitigate a threat of pollution to its essential interests. However, this rule is not customary,⁵⁸ being

54. BROWNLIE, *supra* note _Ref112730796\h * MERGEFORMAT 1, 234; OPPENHEIM'S INTERNATIONAL LAW, *supra* note _Ref112992401\h * MERGEFORMAT 12, at 248; R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 208 (1983).

55. M/V Saiga Case (St. Vincent & Grenadines v. Guinea), Judgment, 1999 ITLOS 2 (July 1); Geneva Convention, *supra* note 8, arts. 4-6; UNCLOS, *supra* note 8, arts. 91-92.

56. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships 1973, Annexes I & II, 1340 U.N.T.S. 62, 197-98 & 233 (entered into force Oct. 2, 1984); International Convention on Oil Pollution Preparedness, Response and Cooperation, 30 I.L.M. 733 (1991) (entered into force May 15, 1995); Protocol on Preparedness, Response, and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, Mar. 15, 2000, *available at* http://www.imo.org/conventions/mainframe.asp?topic_id=258&doc_id=683 (last visited Oct. 6, 2005); Bonn Agreement, Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances 1983, art. 1, 5, June 9, 1969, 9 I.L.M. 359.

57. KISS & SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 552 (2004); D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 800 (1982); XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 11 (2003).

58. BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF

only expressly included in one international treaty,⁵⁹ not ratified by either party to this case. Additionally, there is no evidence of a widespread and general state practice supporting custom. Indeed, Russia's proposal to include this rule in the UNCLOS was rejected, in absence of acceptance by states.⁶⁰ Consequently, Raglan cannot invoke custom to justify the scuttling of *The Mairi Maru*.

iii. The Scuttling of The Mairi Maru breached the Customary Prohibition against the Dumping of MOX

Dumping is defined as the deliberate disposal of wastes or other matter from vessels at sea.⁶¹ Although there is debate as to whether the general prohibition to dump has acquired customary status, there is consensus on the customary status of the prohibition to dump high-level radioactive material such as MOX,⁶² as evidenced from the rule's inclusion in international⁶³ and regional treaties,⁶⁴ as well as its recognition by international organizations.⁶⁵ Moreover, Raglan ratified The London Convention without reservations to the rule that

DECISION 220 (1988).

59. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, May 6, 1975, 970 U.N.T.S. 212.

60. Russia's Proposal to Include Intervention on the High Seas During the Occurrence of a Maritime Casualty, U.N. Doc. A/CONF.62/C.3/L.25 (1975), 4 O.R., 212.

61. UNCLOS, *supra* note Ref112731493\h* MERGEFORMAT 8, art. 1 (5); Convention on the Prevention of the Marine Pollution by Dumping of Wastes and Other Matters (London Convention of 1972), Aug. 30, 1975, 26 U.S.T. 2403.

62. P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 422 (2D ED. 2002); Catherine Redgwell, International Environmental Law, *in* INTERNATIONAL LAW 668 (Malcolm D. Evans ed., 2003); FRED L. MORRISON AND RUDIGER WOLFRUM, INTERNATIONAL, REGIONAL AND NATIONAL ENVIRONMENTAL LAW, 2004, 276.

63. Antarctic Treaty, Jun. 23, 1961, 12 U.S.T. 794; Protocol to the Antarctic Treaty, art. 2 Nov. 1991, 30 I.L.M. 1455; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 9, May 1992, 28 I.L.M. 649.

64. Convention on the Protection of the Marine Environment of the Baltic Sea Area, Apr. 9, 1992, art. 11 (entered into force Jan. 17, 2000), *available at* http://www.helcom.fi/Convention/en_GB/text; *see generally* Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1192; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region art. 10, Nov. 25, 1986, 26 I.L.M. 38 (entered into force Aug. 18, 1990); Convention on the Protection of the Black Sea Against Pollution, Apr. 21, 1992 (entered into force Jan. 15, 1994) *available at* <http://www.blacksea-environment.org/Text/BlackSea/BSBucharest.htm>.

65. *See generally* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Jun. 11, 1974, *available at* <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf205.shtml>; *see also* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Aug. 1978, *available at* <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf205a1r1.shtml>; International Atomic Energy Agency, Definition and Recommendations for the Convention on the Prevention of Marine Pollution, Safety Series No. 78 (1986); 10th Consultative Meeting, London Draft Convention, London Convention of 1972, *supra* note 61.

expressly prohibits the dumping of radioactive material.⁶⁶;B22;B22 In this case, Raglan intentionally scuttled The Mairi Maru laden with MOX, placing this radioactive material at the bottom of the ocean floor in breach of the customary rule that prohibits dumping high-level radioactive material.

The fact that Raglan secured and encased the MOX canisters prior to scuttling has no bearing, since Raglan cannot guarantee that with the passing of time, the changes in temperature and currents, and other circumstances, the MOX will not cause damage to the environment.⁶⁷ Indeed, no security measures regarding the storage of radioactive material are absolutely risk-free.⁶⁸

Raglan may also argue that the scuttling of The Mairi Maru was taken under the exception provided for under Article V(1) of the London Convention that applies when dumping is necessary to save threatened human lives at sea.⁶⁹ However, this exception is to be interpreted narrowly to prevent the unregulated dumping of prohibited substances,⁷⁰ only operating when it involves ships in distress at sea. In this case, human lives aboard The Mairi Maru were not at risk at the time of the scuttling since the crew had already been rescued. Thus, Raglan breached customary law prohibiting the dumping of MOX.

2. The Wrongfulness Of The Scuttling Cannot Be Precluded By Invoking Necessity

i. The conditions for necessity are not met

Raglan may not argue that the wrongfulness of the scuttling of *The Mairi Maru* was precluded due to a state of necessity. Indeed, to claim necessity

66. Amendment to the London Convention, 1993, Res. LC.49(16), adopted Nov. 1993, Preamble; Protocol to the London Convention, Annex II, art. 4(1)(2) 1997 (not in force), available at <http://www.londonconvention.org>; London Convention, *supra* note _Ref112731592\h * MERGEFORMAT 61, art. 7 (b), art. 10 (1).

67. CRAIG SMITH & ADRIAN GLOVER, ENVIRONMENTAL FUTURE OF AQUATIC ECOSYSTEM, THE DEEP SEAFLOOR ECOSYSTEM: CURRENT STATUS AND PROSPECTUS FOR CHANGE BY THE YEAR 2025, available at <http://www.icf.eawag.ch/abstracts/smithglover.pdf> (last visited Oct. 4, 2005); NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA), STUDYING DEEP-SEA BIODIVERSITY AND DUMPING, <http://oceanexplorer.noaa.gov/explorations/deepest01/background/dumping/dumping.html> (last visited Sept. 24, 2005).

68. Maki Tanaka, *Lessons from a Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 MICH. J. INT'L L. 337, 367 (2004).

69. London Convention, *supra* note 61, art. V; Interpretation of the "Force Majeure" and "Emergencies" Exceptions under Article V of the Convention 1972, IMO LC.2/Circ. 343 (Oct. 25, 1994), available at <http://imp.amsa.gov.au/public/> (last visited Oct. 4, 2005).

70. Jill Murakami, *The Dumping of the New Carrisa: An Analysis of the Emergency Provisions of The London Convention*, 8 PAC. RIM L. & POL'Y 705, 707 (1999).

certain conditions established in the ILC Articles on State Responsibility, and recognized by this Court, must be fulfilled,⁷¹ which in this case were not met.

a. The Scuttling was not the only Means available to Reduce the Environmental Damage

In order to plea necessity, it must be impossible to proceed by any means other than the one contrary to international law.⁷² Hence, the state of necessity only applies when all legitimate means to mitigate the possible damage have been exhausted and proved to be of no avail.⁷³ Indeed, Raglan had several legitimate methods which were not considered before scuttling the vessel, as has been done in other cases (*e.g.* the *Prestige*, *Acushnet*, *Hua Ding Shan*, and *Kursk* incidents).⁷⁴ Moreover, international practice places scuttling among the least employed methods of controlling pollution at sea, as its effects on the marine environment have proven negative and violate ocean dumping prohibitions.⁷⁵ In this case, Raglan may have employed other lawful measures, particularly considering that Raglan (i) was able to secure and encase the MOX, which requires similar technical capabilities as discharging the cargo, and (ii) towed *The Mairi Maru* to the location of its scuttling, a process which involves similar techniques as taking it to shore. Accordingly, it is evident that scuttling was not the only means available to Raglan.

b. Raglan Contributed to the State of Necessity

Necessity may not be relied upon when the state claiming it has contributed, by act or omission, to the situation of alleged necessity.⁷⁶ In this case, Raglan contributed to the situation of necessity by failing to police its waters and -through Good acting as a state agent- setting *The Mairi Maru* off

71. ARS, *supra* note 0, art. 25; The Gabčíkovo-Nagymaros Project (Hung./Slovak.), 1997 ICJ Rep. para. 52 (Sept. 25).

72. The Oscar Chinn Case (Britain v. Belgium), 1934 P.C.I.J. (dissenting opinion Anzilotti) No. 23, at 113 (Dec. 12); S.S. Wimbledon Case, 1923 P.C.I.J. (ser. A) No. 1 at 306 (Aug. 17).

73. Treaty of Amity, Commerce and Navigation (Jay Treaty) (UK v. U.S.), art. VII (Nov. 19, 1794); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 71 (1994).

74. *The Prestige Oil Tanker Disaster*, GUARDIAN UNLIMITED, Nov. 20, 2002, <http://www.guardian.co.uk/theissues/article/0,6512,843781.00.html> (last visited Oct. 4, 2005); *Kursk Victims' Slow Death*, BRITISH BROADCASTING CHANNEL NEWS (BBC), Oct. 26, 2000, <http://news.bbc.co.uk/1/hi/world/Europe/1989680.stm> (last visited Oct. 4, 2005).

75. Barry Sheen, *Admiralty Law Institute: Symposium on American and International Maritime Law: Comparative Aspects of Current Importance: Conventions on Salvage*, 57 TUL. L. REV. 1387 (1983); Joseph C. Sweeny, *Collisions Involving Tugs and Tows*, 70 TUL. L. REV. 581 (1995).

76. *Gabčíkovo-Nagymaros Case*, *supra* note _Ref116195120p\h* MERGEFORMAT 71, at para. 57; ARS, *supra* note _Ref112730796\h* MERGEFORMAT 1, art. 25(b).

course. Both of these circumstances caused the wreck of *The Mairi Maru*, subsequently producing the leakage of MOX. Hence, Raglan contributed to the alleged state of necessity and may not argue that the scuttling of *The Mairi Maru* was taken under necessity since the conditions for its application are not met.

ii. Alternatively, even if acting under necessity, Raglan owes compensation to Appollonia

Even if this Court determines that the scuttling of the vessel was done under necessity, the state that has taken measures under necessity, causing damage to another state, is bound to pay compensation.⁷⁷ Thus, in this case, compensation must be paid to Appollonia for the material losses caused.

3. This Court Must Award Compensation For The Loss Of The Mairi Maru And The MOX

As explained *supra*, when damage from an international wrong cannot be made good by restitution, compensation is owed for the financially assessable damage caused. As already proven, the scuttling of *The Mairi Maru* was an internationally wrongful act which caused Appollonia and its nationals to suffer direct financial damage from the loss of MOX and the vessel, a damage which cannot be restituted. Therefore, this Court must award compensation for said losses.

C. Apollonia did not violate any obligations owed to Raglan under International Law in transporting Mox through the waters of the Raglanian Archipelago

1. Appollonia's Passage Through Raglan's Archipelagic Waters Was A Lawful Exercise Of The Right Of Archipelagic Sea-Lane Passage.

An archipelagic state may designate sea-lanes to establish the extensive right of other states to exercise archipelagic sea-lane passage,⁷⁸ which is analogous to transit passage through straits.⁷⁹ Transit passage is the exercise of

77. ARS, *supra* note _Ref112730796\h * MERGEFORMAT 1, art. 27(b); ANTONIO CASSESE, INTERNATIONAL LAW 197 (2001); MATTHEW SHAW, INTERNATIONAL LAW 708 (2003).

78. CHURCHILL AND LOWE, *supra* note _Ref112731781\h * MERGEFORMAT 54, at 127; UNCLOS, *supra* note _Ref112731493\h * MERGEFORMAT 8, art. 53.

79. David L. Larson, *National Security Aspects of the United States Extension of the Territorial Sea to Twelve Nautical Miles*, 2 TERR. SEA J. 189, 189-90 (1992); D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 289 (1999).

freedom of navigation solely for the continuous and expeditious transit between one area of the high seas or economic zone and another.⁸⁰ This right applies to all ships, regardless of type, cargo, means of propulsion or sovereign immunity status.⁸¹ The mere transit of ships carrying High Level Plutonium, Irradiated Nuclear Fuel and High Level Radioactive Waste (e.g. MOX) through the territorial sea of a state is not prejudicial to the peace, good order, or security of the coastal state.⁸² In this case, Raglan by designating its sea-lanes, granted the right of archipelagic sea-lane passage to all ships regardless of cargo, including Appollonia's MOX shipment. Therefore, the passage of *The Mairi-Maru* through Raglanian waters was a valid exercise of its right of archipelagic sea-lane passage.

2. Appollonia Was Not Bound To Notify Raglan Of Its MOX Shipments

i. Appollonia Was not Bound to Notify Raglan under Treaty Law

Under the Convention of Physical Protection of Nuclear Materials and The Basel Convention, states must notify the transport of nuclear materials and hazardous wastes to other states through which said transport takes place. However, neither of them bind Appollonia to notify Raglan, as Raglan has not signed nor ratified any such treaty. According to Article 34 of the VCLT, ratified by both states, treaties cannot create obligations or rights for third non-party states.⁸³ Hence, Appollonia was not bound to notify Raglan of the shipment of MOX under treaty law.

ii. Appollonia was not Bound to Notify Raglan under Customary International Law

Shipment of nuclear substances, including MOX, is a widespread practice among states such as US, Japan, France, and UK (the principal shippers of radioactive materials).⁸⁴ For instance, in September 2004, the *Pacific Pintail*

80. UNCLOS, *supra* note _Ref112731493\h* MERGEFORMAT 8, art. 38(2); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 962 (1999); MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 189 (1993); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 209-10 (1993).

81. J. Peter A. Bernhardt, *The Right of Archipelagic Sea Lanes Passage: A Primer*, 35 CA. J. INT'L L. 719, 768-69 (1995).

82. Raul A. F. Pedrozo, *Transport of Nuclear Cargoes by Sea*, 28 J. MAR. L. & COM. 207, 223 (1997).

83. Vienna Convention on the Law of Treaties, art. 34, Jan 27, 1900, 1155 U.N.T.S. 331; CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 34 (1993); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 140 (1995); CASSESE, *supra* note _Ref116195265\h* MERGEFORMAT 77, at 119.

84. DUNCAN E.J. CURRIE, SOUTH PACIFIC REGIONAL WORKSHOP ON CRIMINAL LAW & ITS ADMINISTRATION IN INTERNATIONAL AND ENVIRONMENTAL CONVENTION, THE INTERNATIONAL LAW OF

and the *Pacific Teal*, two British vessels, carried 140kg of weapons grade plutonium from South Carolina to France, arriving on October 8, 2004.⁸⁵ The shipment of radioactive materials is not likely to be reduced in the future, as evidenced from France's and Japan's contracts to ship radioactive waste until 2011.⁸⁶ The practice of these states is of utmost importance for the purpose of assessing the customary obligation surrounding such shipments.⁸⁷

For a rule of international law to acquire customary status, a widespread, consistent and actual state practice is required.⁸⁸ With respect to the notification of MOX, plutonium and other radioactive waste shipments, such practice does not exist.⁸⁹ For example, Japan kept the route of *The Akatsuki Maru*, a vessel carrying 1700kg of plutonium, secret.⁹⁰ France, Japan and the UK, never revealed the routes of *The Pacific Pintail* and *Pacific Teal*.⁹¹ Hence, although treaties may establish the duty to notify, the element of state practice is lacking. Consequently, since the notification of MOX shipments has not acquired customary law status, Appollonia was not bound to notify Raglan.

SHIPMENTS OF ULTRAHAZARDOUS RADIOACTIVE MATERIALS: STRATEGIES AND OPTIONS TO PROTECT THE MARINE ENVIRONMENT (1998), available at <http://www.globelaw.com/Nukes/Nuclear%20Shipment%20Paper.htm> (last visited Oct. 4, 2005).

85. GREENPEACE INTERNATIONAL, NUKES ON VACATION: ACTIVISTS LIE IN WAIT FOR NUCLEAR SHIPMENT (2004), http://www.greenpeace.org/international_en/news/details?item_id=593488 (last visited Oct. 4, 2005).

86. Lawrence Marin, *Oceanic Transportation of Radioactive Materials: The Conflict Between The Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment*, 13 FLA. J. INT'L L. 361, 369 (2001).

87. See generally J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW (1994); CASSESE, *supra* note _Ref116195265\h * MERGEFORMAT 77, at 123.

88. SHAW, *supra* note _Ref116195265\h * MERGEFORMAT 77, at 80; PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 35 (1997).

89. Eugene R. Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAW 757, 771 (1997).

90. Karen Fredericks, *Plutonium Ship Endangers Millions*, GREENLEFT WEEKLY—ONLINE EDITION, 1992, <http://www.greenleft.org.au/back/1992/76/76p5.htm> (last visited Oct. 4, 2005); Press Release, Greenpeace, *Condemning Japanese Plutonium Shipments* (Nov. 12, 1992).

91. Press Release, Greenpeace, *Plutonium Ships begin Sea Trials before Secret Voyage to Japan* (June 24, 1999), <http://archive.greenpeace.org/pressreleases/nuctreans/1999jun24.htm> (last visited Oct. 4, 2005); Press Release, Greenpeace, *Leaked Document Reveals Deadly N-Waste Wouldn't be Salvaged* (Feb. 18, 1997), <http://archive.greenpeace.org/majordomo/index-pressreleases/1997/msg00034.html> (last visited Oct. 4, 2005); Press Release, *Greenpeace Activist Occupy Cherbourg Granes Prior to Imminent Plutonium Shipment* (July 11, 1999), <http://archive.greenpeace.org/press releases/nuctrans/1999jul11.html> (last visited Oct. 4, 2005).

3. Appollonia Did Not Breach The Precautionary Principle

i. Appollonia's lack of notification of MOX shipments was a precautionary measure

The Precautionary Principle, a general principle of law, defines the duty of states to take all necessary precautions to avoid damage to the environment when the threat of damage is serious and irreversible.⁹² With regard to its MOX shipment, Appollonia complied with said principle by taking safety measures, including not notifying. Indeed, lack of notification of MOX shipments, is precisely a precaution to avoid damage to the environment, because the threat of the damage is serious and irreversible, MOX being considered a high-level radioactive waste capable of causing a grave environmental incidents and classified as a possible object for terror attack, due to the high level of plutonium in MOX fuel.⁹³ Therefore, it is essential and appropriate to limit information regarding MOX shipments to ensure that the environment, the ship and its crew, as well as the cargo, are secure.⁹⁴ Indeed, the public opinion has been aware for some time now that well-known terrorists (*e.g.* Al Qaeda, Osama Bin-Laden) have been trying to get this kind of nuclear fuel since scientists have confirmed that it would be easy to create nuclear bombs from fresh MOX.⁹⁵ Hence, to avoid a terrorist attack against a vessel carrying MOX, the secrecy principle governs shipments containing plutonium.⁹⁶ Accordingly, as already mentioned (*e.g.* the *Pacific Pintail* and *Pacific Teal*) MOX shipment routes throughout the world remain secret.⁹⁷ Moreover, due to matters of national

92. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities [hereinafter Prevention of Transboundary Harm], arts. 3 and 15, 53d Sess., Supp. No. 10, UNGAOR A/56/10 (Nov. 2001); JUSTINE THORNTON & SILAS BECKWITH, ENVIRONMENTAL LAW 35 (1997).

93. Erik Martiniussen, *New MOX-transports from Japan to UK*, BELLONA, Apr. 26, 2002, <http://www.bellona.no/en/energy/nuclear/nuclear/sellafield24269.html> (last visited Oct. 4, 2005); Pete Roche, *Sellafield MOX Plant Struggles Onwards*, SAFE ENERGY E-JOURNAL NO. 22, Sept–Nov. 2001, <http://www.hare-uk.org/safe-energy-no22.htm> (last visited Oct. 4, 2005).

94. MOX Plant Case (Ireland v. United Kingdom), Request for the Prescription of Provisional Measures under Art. 290, Para. 5 of the United Nations Convention on the Law of the Sea, 2001 ITLOS 2 (Dec. 3); Pedrozo, *supra* note _Ref116195839h * MERGEFORMAT 82, at 221; Tanaka, *supra* note _Ref116195910h * MERGEFORMAT 68, at 366.

95. *Green Challenge on UK Nuclear Plant Reaches Court*, PLANET ARK–WORLD ENVIRONMENT NEWS, Aug. 11, 2001, <http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=13189> (last visited Oct. 4, 2005); Gordon Edwards, *Nuclear Power: Exploding the Myths*, ENCOMPASS MAGAZINE, Mar. 2001, available at <http://www.ccnr.org/encompass.html> (last visited Oct. 4, 2005); Gordon Edwards, *Chalk River Test to Inaugurate Basin "Plutonium Economy"*, ENCOMPASS MAGAZINE, Mar. 1998, http://www.glu.org/english/information/newsletters/12_1-winter-spring 1998/ChalkRiverMOXtest.html (last visited Oct. 5, 2005).

96. Marin, *supra* note _Ref116195979h * MERGEFORMAT 86, at 373.

97. Press Release, Greenpeace, Plutonium Ships begin Sea Trials before Secret Voyage to Japan

security and commercial confidentiality a state may withhold vital information.⁹⁸ Therefore, before crediting this standard of secrecy with having caused attacks or wrecks of shipments of radioactive materials, it is pertinent to mention that under this standard no such attacks or wrecks have occurred and radioactive materials have been safely transported by sea since the 1960s.⁹⁹ Accordingly, Appollonia complied with the precautionary principle by not notifying Raglan of the MOX shipments.

a. Appollonia complied with international standards pertaining to the shipment of MOX

Activities deriving from fissionable materials, such as the shipment of radioactive materials (e.g. MOX), are subject to certain international standards arising from the Treaty on the Non Proliferation of Nuclear Weapons, to which Appollonia is a party. Appollonia fully complied with these standards, established in Article III.1 of said Non Proliferation Treaty, since it (i) concluded a safeguard agreement with the IAEA; (ii) entered into separate Safeguard Agreements with the IAEA concerning the transfer of MOX from Appollonia to Maguffin; (iii) entered into an agreement with MARC and reported this agreement to the IAEA; and (iv) reported its shipments of MOX to the IAEA. In any case, Raglan may not invoke any duties or obligations arising from the Non-Proliferation Treaty as basis for its claim, since Raglan is not a party to it and thus lacks any rights to invoke its provisions, under Article 34 of the VCLT. Therefore -even though Appollonia has indeed complied with international standards- had it failed to comply with such standards, Raglan would not be able to invoke such failure before this Court.

(June 24, 1999), <http://archive.greenpeace.org/pressreleases/nuctrans/1999jun24.html> (last visited Oct. 4, 2005); *Stormy Waters for Nuclear Shipments*, BRITISH BROADCASTING CHANNEL NEWS (BBC), UK, July 19, 1999, <http://news.bbc.co.uk/1/hi/uk/398387.stm> (last visited Oct. 4, 2005); Press Release, Greenpeace, Route of Plutonium Shipment Kept Secret, Oct. 1999 <http://www.greenpeace.se/norway/english/9camp/3nuces/93main.htm> (last visited Oct. 4, 2005).

98. Prevention of Transboundary Harm, *supra* note _Ref16196038\h* MERGEFORMAT 92, art. 14; Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of Prevention of Maritime Terrorism*, 18 AM. U. INT'L REV. 369 (2002).

99. Japan's Nuclear Power Program: Power for the Future of Japan: Safety and Security First, <http://www.japannuclear.com/nuclearpower/transportation/safety.html> (last visited Oct. 4, 2005); BNFL, Transporting Nuclear Materials, <http://www.bnfl.co.uk/index.aspx?page=609> (last visited Oct. 4, 2005).

4. Alternatively, Raglan Cannot Contest The Legality Of The Shipment of MOX -Since It Acquiesced To Said Shipments

Acquiescence, a recognized general principle of law,¹⁰⁰ has been defined as silence or absence of protest in circumstances generally calling for a positive reaction of objection.¹⁰¹ When states acquiesce to the conduct of other states without protesting against them, the assumption must be that such behavior is accepted, therefore, said state cannot subsequently claim the illegality of such conduct.¹⁰² The IAEA noted, in its July 31, 1999 report, that Appollonia shipped MOX through Raglan's waters without notifying. Accordingly, by the time of the accident, in July 28, 2002, Raglan was aware that MOX was being shipped through its waters without notification and not once did it protest, complain or object to such shipment. As a result, Raglan acquiesced to Appollonia's shipments of MOX and is barred from claiming the illegality of such conduct.

D. Raglan does not have standing to seek compensation for economic losses resulting from acts that occurred wholly outside of its territorial waters and exclusive economic zone

1. Raglan's Claim Is Inadmissible Since Local Remedies Were Not Exhausted

As established *supra*, before international claims are brought against a state, all effective and available local remedies need to be exhausted.¹⁰³ In this case, Raglanian tourism and sport fishing industries did not bring claims before Appollonian courts as a result of the wreck of *The Mairi Maru*. Hence, Raglan's claim is inadmissible.

Raglan may argue that it currently brings a mixed claim, primarily for the losses caused to the state directly, and hence, would not need to exhaust local remedies. However, when a mixed claim is brought before the Court and it is not made preponderantly for direct damages to the state,¹⁰⁴ local remedies must be exhausted. The test used to determine preponderance is based on the nature of the claim and whether it is brought to secure the interest of the state's

100. *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 401 (1996).

101. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)*, 1984 I.C.J.305 (Oct. 12); *The Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986 I.C.J. 597 (Dec. 22).

102. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 101 at 246; *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. 116 (Dec. 18); SHAW, *supra* note, at 85.

103. *Finnish Ships Arbitration*, *supra* note 2.

104. *Electronia Silcua S.P.A. (ELSI)*, 1989 I.C.J. at 52; AMERASINGHE, *supra* note _Ref112731420\h * MERGEFORMAT 37, at 188.

nationals or that of the state itself.¹⁰⁵ In *Interhandel Case*, this Court decided that the nature of the claim brought by the Swiss Government was indeed a case adopted on behalf of its national, and hence, local remedies needed to be exhausted.¹⁰⁶ In this case, Raglan's claim for compensation for losses to its fishing and tourism industries evidences the exercise of diplomatic protection. Hence, Raglan's claim is inadmissible as local remedies have not been exhausted by such corporations.

2. Raglan Lacks Standing Since Its Legal Interests Have Not Been Affected

i. The Damages to the Sandbars and its Surrounding Waters has not Affected any of Raglan's Individual Legal Interests

A state only has standing to seek remedies for the commission of an internationally wrongful act when it is injured on its own legal rights or interests,¹⁰⁷ which, as recognized in the *South West Africa Case*, must be vested in some text, instrument or rule of law.¹⁰⁸

Raglan seeks compensation for the injury suffered by fishing and tourist corporations due to damage caused to the Norton Shallows, an area located outside its jurisdiction. The fact that this area has not been claimed by any nation renders it *terra nullius*,¹⁰⁹ making it available for the use and enjoyment of all nations, which holds true for the waters surrounding it, regarded as high seas.¹¹⁰

In relation to incidents occurring in common areas such as the high seas, states' individual legal interests are restricted to their flagships, nationals and property,¹¹¹ none of which were affected in this case. Indeed, states have been only held responsible in similar cases when one of the aforementioned interests has been affected.¹¹²

105. Second Report on Diplomatic Protection by John Dugard, Special Rapporteur, to the General Assembly, U.N. Doc. A/CN.4/1514 (2001); AMERASINGHE, *supra* note _Ref12731420\h * MERGEFORMAT 37, at 198.

106. *Interhandel*, 1959 I.C.J. at para. 28.

107. ARS, *supra* note _Ref12730796\h * MERGEFORMAT 1, art. 31; Crawford, *supra* note _Ref12730962\h * MERGEFORMAT 17, at 202, 254; HANQIN, *supra* note _Ref12732373\h * MERGEFORMAT 57, at 236-37; LORI DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 733 (2001).

108. *South West Africa (Ethiopia v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 32-6 (July 18).

109. AKERHURST, *supra* note _Ref116197746\h * MERGEFORMAT 88, at 148; REBECCA WALLACE, *INTERNATIONAL LAW* 93 (1997); BROWNIE, *supra* note 0, at 174.

110. BROWNIE, *supra* note 0, at 174.

111. SMITH, *supra* note _Ref12732449\h * MERGEFORMAT 58, at 87-9.

112. See generally *I'm Alone Case*, 3 RIAA 1609 (Perm. Ct. Arb. 1935); *The Lusitania Cases*, 7 R. Int'l Arb. Awards 32, (Perm. Ct. Arb. 1956); *Owners of The Jessie (U.K. v. U.S.)*, 6 R. Int'l Arb. Awards 57

For instance, in the *Fukuryu Maru* incident (involving the US and Japan), when the US exploded a test hydrogen bomb in the Marshall Islands, injuring Japanese fishermen on the high seas and a fishing resource customarily exploited by Japan with radioactive fallout,¹¹³ the US did not manifest any intention to allocate any part of its *ex gratia* payment for the incident to Japan's losses resulting from the impairment of the area's environment.¹¹⁴ In the 1989 *Bahia Paraiso* incident, an Argentinean ship grounded off the Antarctic Peninsula causing an oil spill which affected US research activities carried out for 20 years in the area.¹¹⁵ However, no claim was made either by the US or any other state to the Argentinean government claiming compensation for damages suffered. Further, in the *Amoco Cádiz Case* a US Court expressly recognized that since damage was done to *res nullius*, no one had standing to claim compensation for environmental impairment.¹¹⁶

These cases evidence states' lack of standing to sue for damage caused in these areas,¹¹⁷ implying that when activities are carried out therein, states and their nationals are at their own risk.

Therefore, since the MOX spill has not caused any damage to Raglan's territorial waters or EEZ -and thus no injury to its individual legal interests- it lacks standing to seek compensation.

ii. Raglan's Right to Exercise its High Seas' Freedoms in the Norton Shallows do not Grant it Standing

Raglan may base its standing on the claim that the damage caused to the marine environment of the Norton Shallows has impaired its exercise of the freedoms of the high seas in the area. However, given the high seas' quality of

(Perm. Ct. Arb. 1955); See generally Cape Horn Pigeon, 9 R. Int'l Arb. Awards 51 (Perm. Ct. Arb. 1959).

113. MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW VOL. 1-15 (1968); HANQIN, *supra* note _Ref112732373\h * MERGEFORMAT 57, at 20; O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law*, 18 DENV. J. INT'L. L. & POL'Y, 1990, 178.

114. Personal and Property Damage Claims, Jan. 4, 1955, 6 U.S.T. 1; Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L. J. 638-39 (1995); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 887 (2002).

115. JONATHAN I. CHARNEY, THIRD STATE REMEDIES FOR ENVIRONMENTAL DAMAGE TO THE WORLD'S COMMON SPACES, IN INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 149-50 (Francesco Francioni & Tullio Scovazzi eds., 1991); John Noble Wilford, *Ship's Oil Leak may Imperil Antarctic Wildlife*, N.Y. TIMES, Feb. 2, 1989, at A9.

116. In *Re Oil Spill by the "Amoco Cadiz" off the Coast of France on March 16, 1978*, No. 376, 1988 U.S. Dist. Lexis 16832, at *29-30 (N.D. Ill. Jan. 11, 1988).

117. Robert McLaughlin, *Improving Compliance: Making Non-State International Actors Responsible For Environmental Crimes*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 388 (2000); ALEXANDRE KISS, DROIT INTERNATIONAL DE L'ENVIRONNEMENT, 3 ÉTUDES INTERNATIONALES 105 (1989).

res communis,¹¹⁸ any damage caused to its environment would be suffered by the international community as a whole as all states would be deprived from their equal rights over it.¹¹⁹ Accordingly, standing to seek due compensation in this regard belongs to the international community, not to states individually,¹²⁰ which bars Raglan from pursuing an action based on individual interests.

3. Alternatively, Appollonia Is Not Responsible For the Damage To The Norton Shallows

i. Appollonia is not Subject to the Strict Liability Doctrine

Raglan may argue that Appollonia is liable for the damage to the Norton Shallows based on a regime of strict liability applicable to the carrying out of hazardous activities. However, the strict liability doctrine may only apply if expressly convened by states.¹²¹ In this case, since no such agreement exists between the parties, the standard of strict liability may not be invoked.

ii. The Damage to the Sandbar and its Surrounding Waters is not Attributable to Appollonia

Should this Court find Appollonia's shipment of MOX unlawful or accept to apply the strict liability doctrine, Appollonia may still not be held responsible since the damage to the Norton Shallows was not caused by any conduct attributable to it. In this regard, states only owe reparation when the damage suffered is the proximate cause of the state's act,¹²² which requires (i) a clear and unbroken connection between the act complained of and the loss suffered,¹²³ and

118. DAMROSCH ET AL., *supra* note _Ref116198346\h * MERGEFORMAT 107, at 1558; HANQIN, *supra* note _Ref112732373\h * MERGEFORMAT 57, at 193.

119. Nuclear Tests Case (Austl. v. Fr.), 1974 ICJ Rep. 253, 457 (Dec. 20); CHARNEY, *supra* note _Ref116198619\h * MERGEFORMAT 115, at 166.

120. BIRNIE & BOYLE, *supra* note _Ref112992608\h * MERGEFORMAT 62, at 196; KISS & SHELTON, *supra* note _Ref112732373\h * MERGEFORMAT 57, at 325.

121. Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law by Robert Quentin-Baxter, Special Rapporteur, U.N. Doc. A/CN.4/346 + Add. 1-2 (1981); JULIO BARBOZA, THE ILC AND ENVIRONMENTAL DAMAGE IN: HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES 78-9 (WETTERSTEIN ED., 1997); Henry Barron, *After Chernobyl: Liability for Nuclear Accidents Under International Law*, 25 COLUM. J. TRANSNAT'L L. 660 (1987).

122. BROWNIE, *supra* note 0, at 225; DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 10 (1999); J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, MARTINUS NIJHOFF, 735 (1973).

123. Administrative Decision No. II, 7 R. Int'l Arb. Awards 23, 30 (1923); Dix Case, 9 R. Int'l Arb. Awards 119 (1959); BROWNIE, *supra* note 0, at 223-27.

(ii) that the latter be either a normal or foreseeable consequence of the former.¹²⁴ Failure to meet these criteria renders the damages not subject to compensation.¹²⁵ As proven *infra*, none of these criteria is met in this case.

- a. There is no clear and unbroken connection between Appollonia's acts and the damage to the Norton Shallows

Intervening causes in the chain of events that lead to a damage relieves a defendant from responsibility.¹²⁶ Regarding hazardous activities, this principle is included in international instruments as a circumstance exempting liability when the damage is caused by an intentional act of a third party.¹²⁷ In this case, the damage to the Norton Shallows would have not occurred without the intervention of extraneous causes independent of any acts attributable to Appollonia, namely (i) the acts of Good who dismantled *The Mairi Maru* and; (ii) the existence of a severe storm which altered the course of the ship, causing it to wreck in the Norton Shallows. Thus, a clear and unbroken connection between Appollonia's MOX shipment and the damage caused is lacking.

- b. *The damage to the Norton Shallows was neither a normal or foreseeable consequence of Appollonia's MOX shipment*

Raglan may argue that there was a high risk of a pirate attack to *The Mairi Maru* at the time of its shipment, and that a spill of MOX resulting from such attack could have been foreseen. However, the attack on *The Mari Maru* and the way it occurred could have not been foreseen by Raglan. This is so if considered that no ship piloted by Raglanian officers or private contractors had ever been attacked by "pirates" and that all attacks that occurred in the past were

124. Lighthouses Arbitration, 12 R. Int'l Arb. Awards 210, 17-18 (Perm. Ct. Arb. 1956); *Naulilaa Case*, 2 R. Int'l Arb. Awards 1012, 32 (1930); *Life Insurance Claims*, German-US Mixed Cl.Comm., in: *Opinions and Decisions January 1, 1933-October 30, 1939* 133-4 (1930); *Beha Case*, German-U.S. Mixed Cl.Comm., in: *Opinions and Decisions January 1, 1933-October 30, 1939* 901 (1940); *Heirs of Jean Maninat Case*, 10 R. Int'l Arb. Awards 55, (Perm. Ct. Arb. 1905); *Sir Cecil Hurst and R. Newton Crane*, Joint Report No. II (Aug. 12, 1904) (regarding the Samoan Claims Award (1902))

125. *Trail Smelter Case*, 3 R. Int'l Arb. Awards 1038; A. Hauriou, *Les Dommages Indirects dans les Arbitraux Internationaux*, *Droit International Public (RGDIP)* 219 (1924).

126. *Lusitania*, 7 R. Int'l Arb. Award, 35-6; *Yuille, Shortridge and Co. Case*, *LaPradelle and Politis, Recueil des Arbitrages Internationaux*, Vol. 2, 109.

127. International Convention On Civil Liability For Oil Pollution Damage, art. III(2)(b), Nov. 29, 1969, 973 U.N.T.S. 3; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, art. 7(2)(b), 35 I.L.M. 1406 (not in force); International Convention on Civil Liability for Bunker Oil Pollution Damage, 25489/25489, art. 3(3)(b), 2001, IMO LEG/CONF. 12. DCI, available at <http://www.imo.org> (last visited October 3, 2005).; Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, art. 5(4), U.N. Doc. ECE/TRANS/84, U.N. Sales No. E.90.II.E.39 (1990) (including Explanatory Report) (The 15640/15640 Convention has not yet come into force).

carried out by private persons with no link to Raglanian authorities. Good's attack was indeed the first to be carried out by a pilot of Raglan's anti-piracy program. Consequently, Appollonia had no basis to foresee neither the occurrence of this attack under these circumstances nor any of its consequences.

Additionally, considering that Appollonia had successfully been shipping MOX for over seven years—even during the highest level of warning—with no similar incident, a MOX spill resulting from a “pirate” attack cannot be regarded as a normal consequence.

Hence, a MOX spill was neither a foreseeable nor normal consequence of Appollonia's shipment of MOX, and thus, it should not be deemed its proximate cause.

4. Alternatively, Appollonia Is Not Bound To Pay Full Compensation

i. Raglan's Alleged Economic Losses are not Subject to Compensation

Under international law it is still unclear whether loss of profits is recognized as an established head of damages.¹²⁸ Notwithstanding, compensation can not be recognized for economic losses suffered by individuals who enjoy a public or common facility not involving a loss or injury to a proprietary interest.¹²⁹ Specifically, regarding harm caused by nuclear activities, the existing treaties governing liability limit compensation to personal injury and damage to or loss of property.¹³⁰ In this case, a proprietary interest over the Norton Shallows is lacking as it is *terra nullius*. Hence, any claim for damages occurring in said area should be disregarded.

ii. Since Raglan's Negligence Contributed to the Damage, Full Recovery is Precluded

If the Court deems that compensation is owed by Appollonia, Raglan's negligence in preventing an attack to *The Mairi Maru* must be considered, as it

128. Derek W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U.L. REV. 940, 940-42 (1986).

129. Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, not in force, art. 2(7)(c); First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities by P.S. Rao, Special Rapporteur, Para. 130, UN Doc. A/CN.4/531 (2003); *Robins Dry Dock & Repair Co. v. Flint*, 275 US 303 (1927); *Union Oil Company v. Oppen*, 501 F.2d 558, 563 (1974); *In re Oriental Republic of Uruguay*, 821 F.Supp 950 (1993); *In Re The Exxon Valdez*, 2002 AMC 1 (2001); *Murphy v. Brentwood District Council*, [1990] A.C. 398.

130. Paris Convention on Third Party Liability in the Field of Nuclear Energy, art. 3, Apr. 1968, 956 U.N.T.S. 266; Agreement Supplementary to the Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy, art. I(1)(k), Dec. 1974, 1041 U.N.T.S. 358; Vienna Convention on Civil Liability for Nuclear Damage, art. I(1)(k), Nov. 1977, 1063 UNTS 265.

raises a question of comparative fault.¹³¹ Indeed, in determining the extent of reparation, account shall be taken of an injured state's contribution to the injury by its willful or negligent conduct.¹³² Indeed, international tribunals have reduced a claimant's award in proportion to her culpability.¹³³ Thus, should Appollonia be held responsible, it would not be bound to pay full compensation, among other causes, due to Raglan's failure to prevent a "pirate" attack to *The Mairi Maru*, as proven *supra*.

V. PRAYER FOR RELIEF

Appollonia respectfully requests that the Court Declare (i) that Raglan is responsible for the attack upon and wreck of *The Mairi Maru* and all consequences that arose from the wreck; (ii) that Raglan is responsible for the loss of *The Mairi Maru* and the MOX onboard as the scuttling of the vessel was illegal and is obliged to pay compensation for these losses; (iii) that Raglan lacks standing to seek compensation for losses resulting from acts that occurred outside its territory; and (iv) that Appollonia did not violate any obligations under international law in the transportation of MOX through Raglanian waters.

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132. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 466 (June 27); GRAEFRATH, RESPONSIBILITY AND DAMAGE CAUSED: RELATIONS BETWEEN RESPONSIBILITY AND DAMAGES, in RECUEIL DES COURS, VOL. 185, 95 (1984).

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IN THE INTERNATIONAL COURT OF JUSTICE

THE CASE CONCERNING THE VESSEL
THE MAIRI MARU

Republic of Appollonia
Applicant

v.

Kingdom of Raglan
Respondent

MEMORIAL FOR THE RESPONDENT

THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

Columbia University, USA

THE CASE CONCERNING THE VESSEL *THE MAIRI MARU*

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II. STATEMENT OF JURISDICTION

The Republic of Appollonia and the Kingdom of Raglan submit their differences concerning *The Mairi Maru* to this Court by Special Agreement, dated May 15, 2004, pursuant to Article 40(1) of the Court's Statute. The parties have agreed to the contents of the Compromis submitted as part of the Special Agreement. In accordance with Article 36(1) of the Court's Statute, each party shall accept the judgment of this Court as final and binding and shall execute it in good faith in its entirety.

III. QUESTIONS PRESENTED

1. Whether Raglan is responsible for the attack on *The Mairi Maru*.
2. Whether Raglan owes Appollonia compensation for any injury resulting from the attack on *The Mairi Maru*.
3. Whether Raglan violated any obligation owed to Appollonia under international law by scuttling *The Mairi Maru*.
4. Whether Appollonia violated international law by shipping MOX through Raglan's archipelagic waters without giving Raglan prior notification or receiving its consent.
5. Whether Appollonia is responsible for the damage to the Norton Shallows and surrounding waters.
6. Whether Appollonia must compensate Raglan for the injury to its fishing and tourist industries and the cost of decontaminating the area.

IV. STATEMENT OF FACTS

The Kingdom of Raglan is a small, developing archipelagic nation lying roughly halfway between the Republic of Appollonia, a nuclear nation, and the Democratic Republic of Maguffin. In 1990, Appollonia discovered uranium deposits below its soil and developed a significant nuclear energy program. Following its construction of a nuclear reactor, Appollonia reached a "safeguards agreement" with the International Atomic Energy Agency (IAEA) regarding the operation of the plant in 1996. [Compromis ¶¶ 1, 3].

Appollonia's nuclear reactor produced, as a by-product, a significant amount of plutonium, which can be used to make mixed oxide fuel (MOX). In 1997, Appollonia entered into a five-year sales agreement with the Maguffin Atomic Recycling Company, Ltd. for the surplus MOX. Appollonia shipped the MOX via private carriers through the Raglanian Archipelago to Maguffin. [Compromis ¶¶ 4-5, 8].

From 1995 to 1999, several groups of technologically-advanced pirates routinely attacked ships in Raglan's archipelagic straits. By 1998, the Insurers of Lading and Shipping Association (ILSA) recognized the danger presented by the attacks and issued, a "five-point warning," (ILSA's strongest warning) to insurers and re-insurers of ships traveling the archipelago. As a result, shipping traffic through the archipelago decreased dramatically. Appollonia, however, continued its MOX shipment through the archipelago. [Compromis ¶¶ 6-8].

In a July 1999 report, the IAEA criticized Appollonia's transport of MOX, noting that Appollonia "gives no notice to . . . Raglan that MOX will be transported through [its] territorial waters or exclusive economic zones. MOX is shipped without adequate safeguards on private vessels through waters known to be frequented by pirates." Appollonia responded that its navy was ill-equipped to protect its MOX shipments, that the private carriers provided better security, and that the security of the shipments required secrecy. [Compromis ¶¶ 8-10].

To combat the continuing pirate attacks in its straits, Raglan announced its anti-piracy program in October 1999. The voluntary program provided requesting ship captains with a Raglanian naval officer to steer the ship through Raglan's archipelago. The naval pilot would maintain constant contact with the Raglanian navy, which could respond to an attack within thirty minutes. The program was highly successful; during the program's first two years, no vessel utilizing the program was attacked. In response to the reduction in attacks in the archipelago, ILSA reduced its alert level to a "four-point warning." By November 2001, the success of the piloting program created a demand that Raglan's navy was unable to meet with its own personnel. Raglan hired one

hundred private contractors to supplement its program. [Compromis ¶¶ 11–13, Clarifications ¶ 9].

The Mairi Maru, a large, double-hulled ocean-going cargo ship, set sail for Maguffin on July 26, 2002, carrying several canisters of MOX. Only the Appollonian government, the IAEA, the captain and first officer of the vessel were aware of the shipment. A storm delayed *The Mairi Maru* several hours past its scheduled departure time, and it did not approach the archipelago until near dusk on July 27, 2002. The ship's captain radioed Raglan requesting a pilot. Shortly thereafter, one of Raglan's private contractors was transported to the ship by a privately-owned and operated vessel hired by the Raglanian navy. He arrived on the ship with two assistants and identified himself as Thomas Good. [Compromis ¶¶ 14–16, Clarifications ¶¶ 3, 9, 11].

Good boarded the ship on the high seas. *The Mairi Maru* entered Raglanian waters at 2200 hours. At 2300 hours, Good informed *The Mairi Maru*'s captain that he had explosives he would detonate unless the ship was surrendered to his control. The captain capitulated, and he and the crew were locked in the ship's galley. Good took control of the vessel, navigating it to a location where he met with fellow confederates. Good's group removed all of the ship's navigation equipment, disabled the aft propeller shaft, and then disembarked, leaving *The Mairi Maru* to drift on a south-easterly course toward international waters. The MOX was left undisturbed in a locked hold. [Compromis ¶¶ 17–18, Clarifications ¶¶ 3, 11].

The next day, July 28, 2002, a storm pushed *The Mairi Maru* into the Norton Shallows, a region of uninhabited sandbars located 250 nautical miles from Raglan's archipelagic baseline and used exclusively by Raglan-incorporated firms for sport fishing and eco-tourism, which provide Raglan with more than 80 million Euro of tax revenue annually. *The Mairi Maru* ran aground in the Shallows. Its hull was breached, and the compartment containing the MOX canisters was ruptured, causing damage to the canisters. The canisters began to leak into the surrounding area, and over fifty kilograms of highly radioactive MOX pellets spilled out onto the sandbar and into the surrounding water. A Raglanian naval patrol boat spotted the wreckage on July 29, 2002. Upon arrival, the naval medical support team found several crew members dead, and the rest suffering from acute radiation syndrome. [Compromis ¶¶ 2, 19–20, Corrections ¶ 4, Clarifications ¶ 4].

Raglan's Prime Minister Robert Price notified the President of Appollonia, Judith Stark, that *The Mairi Maru* had crashed, and was leaking radioactive material causing severe damage to the entire region. Further, impending storms threatened to spread the radioactive material toward Raglan's inhabited islands. Mr. Price noted that Appollonia failed to give Raglan notice of the MOX shipments, which he maintained violated Appollonia's duties as a member of the IAEA. Had notice been given, Raglan would have either denied *The Mairi*

Maru access to the straits, or taken greater efforts to protect the ship and its cargo. Lastly, Mr. Price informed Appollonia that Raglan expected Appollonia to pay for the cleanup of the area, and compensate Raglan for its lost tourism revenue. [Compromis ¶¶ 21, 22, 24, 25].

On August 4, 2002, Raglan announced its intention to sink the ship and the MOX to the ocean floor. Raglan maintained that scuttling *The Mairi Maru* was its only option to minimize the danger presented by the ship. Later that week, Raglan encased the MOX in canisters, towed *The Mairi Maru* to Sand Deep and sunk the vessel 9000 meters. [Compromis ¶¶ 21–24, Corrections ¶ 4, Clarifications ¶¶ 4, 12].

Appollonia responded, claiming it had met its obligations regarding the shipments, and that Raglan must bear responsibility “for the crash and its consequences.” Regarding the shipping, Appollonia maintained that Raglan was aware of the shipping, it did not breach its obligations as a member of the IAEA, and that Raglan has no standing to raise issues regarding IAEA obligations. [Compromis ¶¶ 25–29].

Regarding the scuttling, Appollonia insisted Raglan was responsible for the attack on *The Mairi Maru*, and that its negligence in screening pilots made Raglan liable for the loss of the ship, and harm to its crew. Appollonia also announced that it considered Raglan’s actions a violation of the London Convention. [Compromis ¶¶ 28–30].

Taking notice of the increased tension between the two nations, the Regional Organization of Nations (RON), in a July 1, 2003 session, called upon Raglan and Appollonia to bring this case before the International Court of Justice. The nations agreed, and the submissions of both parties followed. [Compromis ¶¶ 30–33].

V. SUMMARY OF PLEADINGS

- I. Raglan incurred no liability for Thomas Good’s attack on *The Mairi Maru* because no international obligation owing to Appollonia was breached. Piracy was codified as a crime under international law solely to provide states with an extraterritorial basis for jurisdiction over crimes that occurred on the high seas. As such, international law delineates no basis for a claim of piracy in a case such as this, where criminals hijack ships within sovereign waters. Additionally Raglan’s successful anti-piracy program, with the full force of the Raglanian Navy behind it, met the general international law obligation of all states to cooperate fully in suppressing piracy. In any event, the hijacking of *The Mairi Maru* was in direct contravention of Good’s duties as a safety officer and wholly outside Raglan’s control. Because international law distinguishes between acts committed under a state’s direction, and acts outside the scope of state

control, refusing to hold states responsible for the latter, Good's actions cannot be attributable to Raglan.

- II. Raglan acted reasonably and in accordance with international law in scuttling *The Mairi Maru*. Due to Raglan's treaty and customary international law obligations requiring protection of the marine environment, Raglan had no choice but to scuttle the vessel. Though the radiation-leaking ship already posed a grave threat to the Norton Shallows and surrounding waters, the impending rainy season threatened catastrophic exposure to the entire region, making cleanup impossible. Although time was of the essence, Raglan abided by all applicable international obligations prior to and during the scuttling the vessel. Raglan's lack of alternatives in the matter justifies its actions under the necessity doctrine, which precludes wrongfulness where a state must take actions that may be considered unlawful in less demanding circumstances.
- III. Appollonia violated international law by shipping MOX through Raglan's archipelago without providing prior notification of the transit. Raglan's right to require notification and/or consent is consistent with the provisions governing navigational regimes and nuclear transport in the 1982 Convention on the Law of the Sea, widely recognized as a codification of international law. Further, evidence of the right to require prior notification exists in the significant amount of domestic legislation that requires prior notification of ships carrying ultra-hazardous cargo, and, more importantly, in the number of shipping states that understand their legal obligation to comply with this legislation. Furthermore, regulations promulgated by the International Atomic Energy Agency require Appollonia to notify "pass-through" states like Raglan of the shipment of nuclear materials. Any claims that the secrecy of the transit was required for security purposes demonstrates Appollonia's unabashed disregard not only for the safety of the region's inhabitants, but also for the region's entire eco-system.
- IV. Raglan has standing to bring a claim for compensation for the cost of decontaminating the Norton Shallows and the injury to its fishing and tourism industries based on an *erga omnes* duty to protect the marine environment. Appollonia is liable to Raglan under several theories of liability. First, Appollonia violated its customary international legal obligation to prevent transboundary environmental harm. Second, international law recognizes a strict-liability system of fault for injury arising from ultra-hazardous activity, including the shipment of hazardous nuclear material. Lastly, even under a "due diligence" system of fault, Appollonia cannot plausibly maintain that it met its duty of general care to prevent transboundary environmental harm when it launched *The Mairi Maru* and its nuclear cargo without notifying Raglan of the ship's contents.

VI. PLEADINGS

A. Raglan Is Not Responsible For The Attack On The Mairi Maru And Owes No Compensation For Any Resulting Injury

1. Raglan met any obligation under international law to prevent piracy, and is not responsible for the attack and its aftermath

Thomas Good's hijacking of *The Mairi Maru* was criminal and reprehensible. However, under international law, Raglan incurs no liability based upon Good's actions. Although pirates have long been considered *hostis humanis generis*,¹ the duty of nations regarding piracy is less obligatory than that term suggests. The 1932 Harvard Draft Articles on Piracy, which served as the foundation for the piracy sections of both the 1958 Geneva Convention on the High Seas (hereinafter 1958 Convention) and 1982 United Nations Convention on the Law of the Sea (hereinafter 1982 Convention),² explains that the establishment of piracy as a crime is intended to permit states to exercise extraterritorial jurisdiction to prosecute and punish pirates, but does not require them to do so.³

Moreover, any obligation imposed by either treaty or customary international law is far from absolute. Under Article 100 of the 1982 Convention, to which Raglan is a party,⁴ and which codifies customary international law,⁵ "States shall co-operate to the fullest possible extent in the repression of piracy on the high seas."⁶ This obligation echoes Article 18 of the Harvard Draft, which proposed that parties "agree to make every expedient use of their powers to prevent piracy, separately and in co-operation."⁷ Raglan's highly successful anti-piracy program represented the fullest extent of its capabilities to prevent such attacks. Raglan hired one hundred independent contractors to supplement

1. Ian Brownlie, *Principles of Public International Law* 244 (3d ed. 1979); Patricia W. Birnie, *Piracy Past, Present and Future*, 11 MARINE POL'Y 163, 165, 170 (1987).

2. George Smith, *From Cutlass to Cat-O'-Nine Tails: The Case for Int'l Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT'L L. 227, 230 (1989); Barry H. Dubner, *Human Rights and Envt. Disaster, Two Problems that Defy the "Norms" of the Int'l Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 16-17 (1997).

3. Harvard Research in Int'l Law, *Commentary to the Draft Convention on Piracy*, 26 AM. J. INT'L L. SUPP. 749, 760 (1932) [hereinafter "Harvard Research, Piracy"].

4. United Nations Convention on the Law of the Sea, art. 100, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

5. See Patricia W. Birnie, *supra* note 1, at 165; D.P. O'Connell, *The International Law of the Sea* (1982); John Norton Moore, *Customary International Law After the Convention*, in *THE DEVELOPING ORDER OF THE OCEANS* 41 (Robert E. Krueger & Stefan A. Risenfeld eds., 1985).

6. UNCLOS, *supra* note 4, at art. 100; Convention on the High Seas, art. 14, Apr. 27, 1958, 13 U.S.T. 2312 [hereinafter 1958 Convention].

7. Harvard Research, *Piracy*, *supra* note 3, at 746.

a program that already employed all available naval officers to pilot ships through the archipelago. As a developing nation, Raglan did all it could with the limited resources available to it.

2. Thomas Good's actions do not constitute piracy under international law and are not an appropriate basis for an international legal claim

Thomas Good's actions do not constitute piracy under international law. As established in several international legal instruments, the offense of piracy requires the following elements:

- 1) Illegal acts of violence or detention;
- 2) Committed for private ends;
- 3) By the crew or passengers of a ship;
- 4) against another ship or against persons or property on board the other ship; and
- 5) On the high seas.⁸

The element requiring that piracy occur on the high seas is fundamental because initial codification of the crime was to provide extra-territorial jurisdiction to states seeking to prosecute pirates.⁹ Although Good boarded *The Mairi Maru* on the high seas, his crimes were committed within Raglan's territorial jurisdiction. While this Court has never definitively addressed the question regarding the treatment of crimes in which the elements are committed in multiple jurisdictions, this Court may refer to Article 38(1)(c) of its statute.¹⁰ These general principles of law support the proposition that where any element of an offense is committed within the jurisdiction of a state, that state may consider itself the territorial state and may assert jurisdiction over the offender.¹¹ Thus, although Good may be prosecuted by Raglan for armed robbery, hijacking, or a similar offense, he may not be charged with piracy.

8. 1958 Convention, *supra* note 8, at art. 14; UNCLOS, *supra* note 4, at art. 101; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 3, Mar. 10, 1988, 1678 U.N.T.S. 222; Robert Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT'L L. 317, 328 (2002); Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy, and IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 272 (1988).

9. Harvard Research, *Piracy*, *supra* note 3.

10. Statute of the Int'l Court of Justice, art. 38(1)(c), June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetext/istatute.html>.

11. See e.g., U.S. MODEL PENAL CODE §1.03(1)(a) (1962); HENRY P. DE VRIES ET AL., FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION (rev. 1988); Code of Criminal Procedure, art. 693; Mi Zhou & Shizhou Wang, *China*, in 2 INT'L ENCYCLOPEDIA OF LAWS, (Dupont & Fijnaut eds., 1993); Daniel David Ntanda Nsereko, *Criminal Law and Procedure in Uganda*, in INT'L ENCYCLOPEDIA OF LAWS (L. Dupont & C. Fijnaut eds., 1996); HR 6 April 1915, NJ 1915 (Netherlands), p. 427 (*cited in* J.A.W. Lensing, *The Netherlands* 51, in 3 INT'L ENCYCLOPEDIA OF LAWS, (Dupont & Fijnaut eds., 1993).

3. Thomas Good's actions are not attributable to Raglan

Raglan is not legally responsible for the events surrounding the attack and crash of *The Mairi Maru*. As explained in Article 2 of the International Law Commission's (ILC) Draft Articles on State Responsibility, which this Court may consider as evidence of customary international law, states are only liable for conduct attributable to the state that constitutes a breach of an international obligation.¹² Raglan breached no obligation with regard to piracy. Good did not commit piracy under the internationally recognized definition, and, in any event, Raglan met any duty to prevent and suppress the same. Good's attack on *The Mairi Maru* certainly violated municipal law. However, the attack breached no international legal obligation owing to Appollonia.¹³ This Court recognized in the *ELSI* case that "[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions."¹⁴ Good's actions cannot legally be attributed to Raglan, and thus do not give rise to Raglan's responsibility for the loss of *The Mairi Maru*.

a. Thomas Good acted contrary to Raglan's instruction and outside Raglan's control

Under international law, a state is not responsible for all acts performed by its nationals,¹⁵ and the state must direct or control the activity attributed to it.¹⁶

12. International Law Commission [ILC], Report of the International Law Commission Fifty-third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 2, International Law Commission, U.N. GAOR 56th Sess., Supp. No. 10 A/56/10 (Apr. 23 – June 1 & July 2 – Aug. 10, 2001) [hereinafter *Draft Articles on Responsibility of States*]. See also, Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, at 23 (June 27); Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 47 (Feb. 5); Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 170 (July 29, 1989); The Rainbow Warrior Case (N.Z. v. Fr.), 20 R. Int'l Arb. Awards 217 (Perm. Ct. Arb. 1990).

13. Malvina Halberstam, *International Maritime Navigation and the Installations on the High Seas*, in M. CHERIF BASSIOUNI, 2 INTERNATIONAL CRIMINAL LAW 819 (2d ed. 1999); Beckman, *supra* note 8, at 320.

14. Elettronica Sicula S.P.A. (ELSI), (U.S. v. Italy), 1989 I.C.J. 15, 51 (July 20); See also Norwegian Shipowners' Claims Case (Nor. v. U.S.), 1 R. Int'l Arb. Awards 309, 331 (Perm. Ct. Arb. 1922); See generally *The Tinoco Case* (U.K. v. Costa Rica), 1 R. Int'l Arb. Awards 371, 386 (Perm. Ct. Arb. 1923); *The Wollemborg Case* (Italy v. U.S.), 14 R. Int'l Arb. Awards 283, 289 (Perm. Ct. Arb. 1956).

15. See e.g. IAN BROWNIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 132-66 (1983); David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109 (Richard B. Lillich et al., eds., 1998); HARITINI DIPLA, LA RESPONSABILITÉ DE L'ÉTAT POUR VIOLATION DES DROITS DE L'HOMME: PROBLÈMES D'IMPUTATION (1994); F. Prezetacznik, *The Int'l Responsibility of States for the Unauthorized Acts of their Organs*, 1 SRI LANKA J. OF INT'L L. 151 (1989).

16. *Draft Articles on Responsibility of States*, *supra* note 12, at 104; *Starrett Housing Corp. v. Gov't of the Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 143 (1983); *Loizidou v. Turkey*, Merits, 6 Eur. Ct. H. R. 2216, 2235-36 (1996).

In *Nicaragua*, this Court refused to attribute the activities of Nicaraguan *contras* to the United States, even though it recognized the substantial role of the U.S. in “financing, organizing, training, supplying and equipping the *contras*,” as well as “the selection of its military or paramilitary targets, and the planning of the whole of its operation.”¹⁷ Instead, this Court required Nicaragua prove that the U.S. directed the perpetration of the acts which formed the basis of Nicaragua’s complaint. Absent such proof, this Court held that the *contras*’ acts were not attributable to the U.S.¹⁸ Under this test, Good’s actions are clearly not attributable to Raglan. Indeed, unlike the U.S. in *Nicaragua*, Raglan’s purpose in employing Good was to prevent attacks, not to direct individuals like Good to carry them out. Because he acted contrary to Raglan’s direction and outside of its control, Good’s acts are not attributable to Raglan under standards established by this Court.

b. Raglan is not responsible for Thomas Good’s ultra vires actions

Under international law, state responsibility for *ultra vires* actions only attaches when individuals act so that they appear “as competent officials” using “powers or methods appropriate to their official capacity.”¹⁹ As the ILC recognized, “[c]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.”²⁰ Though he appeared as an official when boarding the ship, within an hour it was clear that Good was acting far outside his capacity as a Raglanian pilot. When Good and his associates threatened the crew with explosives and commandeered the vessel, they ceased to be “competent officials or agents” of Raglan.

Significantly, the Iran Claims Tribunal recognized in the *Yeager Case*²¹ that an individual’s *ultra vires* conduct is not attributable if the individual or organ acts in a “purely private” rather than an official capacity, even if the individual or organ “used means placed at its disposal by the State for the exercise of its function.”²² In *Yeager*, an Iran Air agent commandeered the

17. *Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. at 64.

18. *Id.*

19. *The Caire Case*, (Fr. v. Mex.), 5 R. Int’l Arb. Awards 516, 530 (Perm. Ct. Arb. 1929); *The Mosse Case*, 13 R. Int’l Arb. Awards 494 (Perm. Ct. Arb. 1953).

20. *Draft Articles on Responsibility of States*, *supra* note 12, at 102; see also Jan Arno Hessbruegge, *The Historical Dev. of the Doctrines of Attribution and Due Diligence in Int’l Law*, 36 N.Y.U. J. INT’L L. & POL. 265, 270 (2004).

21. *Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92 (1987); cf. *Petrolane, Inc. v. Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. Rep. 64, 92 (1991).

22. *Id.* at 110–11.

ticket office of Iran Air, a government-owned airline, and illegally required passengers to pay extra money for plane tickets already purchased. In determining that the agent's acts were not attributable to the Iranian government, the Tribunal noted that the Iran Air agent was not "acting for any other reason than personal profit," and there was no indication that he had "passed on the payment to Iran Air."²³ Similarly, Good abused his position as a privately-contracted ship pilot. His actions were undertaken entirely for his own personal gain and that of his confederates. Therefore, Good's acts are not attributable to Raglan under international law.

B. Raglan Is Not Liable To Appollonia For Scuttling The Mairi Maru

1. Raglan is obligated to protect the marine environment

As a party to the 1982 Convention, Raglan is required to protect and preserve the marine environment.²⁴ In addition, customary international law recognizes the rights of coastal states to intervene where their shores and citizens are threatened by pollution.²⁵ The radiation leaking from *The Mairi Maru* presented a grave risk to the marine environment and human safety throughout the region. Raglan had no option but to scuttle the vessel. As Raglan's Prime Minister Price explained, "[w]ith every passing day, more noxious material leak[ed] into the open waters."²⁶ Further, the impending rainy season made it entirely likely that the pollution, then only twenty-five kilometers from Raglan's exclusive economic zone, would soon spread to Raglan's western islands.

2. Raglan's actions were necessary for the protection of the region's inhabitants, as well as the surrounding waters and marine life

The scuttling of *The Mairi Maru* was justified under the doctrine of necessity. International law recognizes that actions that may be considered breaches under certain circumstances are justified when the situation presents "nothing less than a clear and absolute necessity."²⁷ In the *Gabcikovo-*

23. *Id.*

24. UNCLOS, *supra* note 4, at art. 221.

25. See Int'l Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 278 [hereinafter "SOLAS"]; Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 1341 U.N.T.S. 61 [hereinafter MARPOL 73/78]; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, art. I, Nov. 29 1969, 26 U.S.T. 765, 970 U.N.T.S. 212.

26. Compromis, ¶ 24.

27. R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 91 (1938); *Russian Fur Seals Controversy of 1893*, 86 BRITISH AND FOREIGN STATE PAPERS, 220 (1893); See generally Fisheries

Nagymoros case,²⁸ this Court recognized that the ILC's codification of necessity in Article 33 of its Draft Articles on State Responsibility "reflect[s] customary international law."²⁹ The recognized elements are as follows:

Necessity may be invoked only when the act "(a) [i]s the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole."³⁰

Further, a state may only invoke necessity provided it has not "contributed to the situation of necessity."³¹

a. The nuclear materials emanating from The Mairi Maru presented a grave and imminent peril

The radioactive material emanating from *The Mairi Maru* presented a grave risk to the crew of the ship, several of whom are dead, the marine environment surrounding the ship, and any cleanup crew dispatched to the area. The impending rainy season and its accompanying winds threatened to spread radiation throughout the region, endangering not only the Shallows, but the nations of Raglan and Maguffin as well. Cleanup before the rainy season was impossible.

International law recognizes the importance of human safety and environmental health.³² The harm implicated by a nuclear accident is unmatched in human experience. Not only do nuclear materials cause immediate and mass destruction to the area in which the accident occurs, but the harm continues for generations. Chromosomal damage and birth defects are an irreversible consequence of nuclear exposure.³³ *The Mairi Maru*, stranded upon the Shallows and emanating radiation, presented the gravest, most imminent threat possible to the surrounding environment and the human community in the

Jurisdiction Case (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4); Okon Akiba, *Int'l Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai)*, 37 NAT. RESOURCES J. 809 (1997); See generally Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT'L L. 485 (2004).

28. *Gabcikovo-Nagymaros Project*, 1997 I.C.J. at 7.

29. *Id.* at 40, ¶ 51; see also Roman Boed, *State of Necessity as a Justification for International Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 4-12 (2000); M/V Saiga (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143 (Int'l Trib. L. of the Sea 1999).

30. *Draft Articles on Responsibility of States*, *supra* note 12, at art. 25(2)(a)-(b); See also, *Gabcikovo-Nagymaros Project*, 1997 I.C.J. at 45.

31. *Draft Articles on Responsibility of States*, *supra* note 12, at art. 25(2)(b); Roberto Ago, *Addendum to the Eighth Report on State Responsibility*, U.N. DOC. A/CN.4/318/ADD.5-7, reprinted in [1980] 2 Y.B. INT'L L. COMM'N 13 (pt. 1), para. 77.

32. *Russian Fur Seals Controversy of 1893*, *supra* note 27; *Akiba*, *supra* note 27.

33. See generally, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Lexis 8, 44-45 (July 8).

region. These dangers would increase exponentially if the radioactive materials were allowed to remain in the water long enough for a cleanup crew to attempt to salvage the ship and detoxify it. Scuttling was the only means of avoiding a catastrophe.

b. Raglan's interest in protecting the region at large outweighs any competing interests in salvaging the wreckage

Raglan's scuttling was consistent with state practice on this question. In the *Torrey Canyon* incident, the Liberian oil tanker *Torrey Canyon* went aground outside British territorial waters, spilling large amounts of oil that threatened the English coastline.³⁴ The British Government bombed the ship and burned the remaining oil,³⁵ "stress[ing] the existence of a situation of extreme danger." No international protest resulted.³⁶ This Court should view Raglan's actions with similar deference, as its coastline was also threatened by a crash outside its territorial waters. Just as Britain's interests in protecting its coastline outweighed Liberia's interest in recovering the *Torrey Canyon*, this Court should recognize Raglan's analogous interest in this matter. Appollonia cannot plausibly assert that its interest in *The Mairi Maru* and its cargo was greater than Raglan's interest in protecting human life and the marine environment. Raglan concedes Appollonia's interest in preserving its flag vessels;³⁷ however, the interest of the entire international community in avoiding a nuclear disaster clearly justifies Raglan's actions.

c. Raglan did not substantially contribute to the situation requiring the scuttling

Subparagraph 2(b) of Article 25 is a narrow exception preventing states from relying upon the necessity plea if they substantially contributed to the harm. As the commentary explains, "[f]or a plea of necessity to be precluded . . . the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral."³⁸ Given Raglan's lack of knowledge

34. HER MAJESTY'S STATIONERY OFFICE, THE "TORREY CANYON," 1976, Cmnd. 3246 [hereinafter THE "TORREY CANYON"]; See also Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 PACE INT'L L. REV. 27, 62 (2002); P. J. Griggs, *Toward a Third Party Liab. Convention*, 22 TUL. MAR. L. J. 119, 122 (1997).

35. THE "TORREY CANYON", *supra* note 34; See generally EDWARD COWAN, OIL AND WATER: THE TORREY CANYON DISASTER (1968); See generally CRISPIN GILL ET AL., THE WRECK OF THE TORREY CANYON (1967).

36. THE "TORREY CANYON", *supra* note 34.

37. See generally S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7).

38. Draft Articles on Responsibility of States, *supra* note 12, at 205; See also, *Gabcikovo-Nagymaros Project*, 1997 I.C.J. at 7.

about the ship's nuclear cargo, and its ongoing efforts to safeguard ships from attack, it would be unjust to preclude Raglan's invocation of the necessity defense, considering the catastrophic harm it prevented by scuttling *The Mairi Maru*.

C. Appollonia Violated International Law When It Failed To Provide Raglan With Prior Notification Of Its Clandestine MOX Shipments

In the last decade, several shipments of nuclear materials have circumnavigated the globe,³⁹ posing a threat to coastal nations' environmental, ecological and economic security. Consequently, these states have protested and claimed a right to deny permission to enter their national waters. The attack on *The Mairi Maru* illustrates the hazardous outcomes that can occur when states disregard the rights of nations along their shipping routes.

1. Appollonia violated the 1982 Convention by failing to notify Raglan of the transportation of ultra-hazardous materials through its archipelago

a. The archipelagic regime permits Raglan to demand prior notification of the transport of ultra-hazardous material through its archipelagic waters

As an archipelagic nation, Raglan's very existence depends on the sea. The 1982 Convention represents an important development in the environmental law of the sea that recognized and addressed the unique difficulties facing archipelagic nations.⁴⁰ Under the 1982 Convention, archipelagic waters are submitted to the same regime as the territorial sea, *i.e.* the suspendible right of innocent passage for foreign vessels.⁴¹ However, the archipelagic state may designate sea lanes to be used for expeditious passage through the archipelago⁴² Such sea lanes are submitted to a regime that is essentially identical to "transit passage" through straits used for international navigation.⁴³ All ships enjoy the right of "archipelagic sea lanes passage" and no distinctions may be made

39. See Document 49, 3 THE UNITED NATIONS BLUE BOOKS SERIES, 187 *et seq.* (1995).

40. See Moira L. McConnell & Edgar Gold, *The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Env't*, 23 CASE W. RES. J. INT'L L. 83, 99 (1991); see also, Rachel Zajacek, *The Dev. of Measure to Protect the Marine Env't from Land Based Pollution: The Effectiveness of the Great Barrier Reef Marine Park Auth. in Managing the Effects of Tourism on the Marine Env't*, 3 JAMES COOK U. L. REV. 64, 65 (1996).

41. UNCLOS, *supra* note 4, art. 52(2).

42. *Id.* art. 53.

43. UNCLOS, *supra* note 4, at art. 54; B. Kwiatkowska, *The Archipelagic Regime in the Practice of the Phil. and Indon.—Making or Breaking Int'l Law?*, 6 INT'L J. OF ESTUARINE AND COASTAL L. 25–26 (1991).

according to the nature of the vessel or its cargo.⁴⁴ However, the enjoyment of these freedoms does not limit the rights of the archipelagic state to require ships carrying ultra-hazardous material to pass through specific sea lanes, and to observe precautionary measures established by international agreements⁴⁵ and generally accepted international regulations.⁴⁶ One such fundamental regulation provides archipelagic nations the right to demand notice of ultra-hazardous shipments traversing these sea lanes.⁴⁷

Notification requirements do not impinge upon Appollonia's right to continuous and expeditious passage through the archipelago,⁴⁸ and are consistent with the provisions of the 1982 Convention requiring that the flag state has due regard for archipelagic states' rights and duties.⁴⁹ Furthermore, a requirement of notification does not constitute discrimination based on the characteristics of a vessel's cargo, which would contravene Articles 24 and 26 of the 1982 Convention.⁵⁰ Raglan stresses that prior notification by the originating state does not hamper a vessel's passage, and does not violate the 1982 Convention's non-discrimination provisions. This notification is vital for archipelagic states, whose waters are often marked by shoals, rocks and coral reefs. Navigation through these waters is far more dangerous and the risk of accidents higher than in the territorial sea.⁵¹ Without notice that the transit of ultra-hazardous material is pending, an archipelagic nation cannot take the safety precautions necessary to protect all potentially affected parties from harm.⁵²

b. The archipelagic regime in the 1982 Convention is customary international law binding upon Appollonia

International law recognizes that provisions of multilateral treaties can bind third party states by either incorporating or giving recognition to a customary

44. UNCLOS, *supra* note 4, arts. 41–42, 44, 53(2); Cf. HIRAN W. JAYEWARDENE, 15 THE REGIME OF ISLANDS IN INTERNATIONAL LAW 161–62 (Shigeru Oda gen ed., 1990); See also T. Treves, *La navigation*, in *TRAITÉ DU NOUVEAU DROIT DE LA MER* 687, 800–02 (Rene-Jean Dupuy & Daniel Vignes eds., 1985).

45. UNCLOS, *supra* note 4, art. 38.

46. UNCLOS, *supra* note 4, arts. 22, 23; E.g., MARPOL 73/78, *supra* note 25; SOLAS, *supra* note 25; Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, T.I.A.S. No. 8587.

47. See discussion *infra* Part IV.B.

48. UNCLOS, *supra* note 4, art. 23.

49. *Id.* arts. 58(3), 87(2).

50. *Id.* arts. 24, 26.

51. MOHAMED MUNAVVAR, 22 OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA 166 (Shigeru Oda gen. ed., 1995).

52. See Press Release, Dominican Republic, Secretary of State for Foreign Affairs, Declaration of the Secretary of State for Foreign Affairs of the Dominican Republic (January 2, 1998).

rule, or as being *fors at ariso* of an area of international law that subsequently secured the general assent of states and thereby was transformed into custom.⁵³ Rapid crystallization into customary law is possible where "state practice, including that of States whose interests are specially affected, [was] both extensive and virtually uniform in the sense of the provision invoked," and if the provision reflected "settled practice, [and] . . . evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."⁵⁴

Raglan submits that the provisions relating to archipelagic waters in the 1982 Convention, ratified by over 145 nations, are a codification of customary international law.⁵⁵ Chapter IV of the 1982 Convention reflects long-standing practice of archipelagic nations and regional agreements proscribing rights in the waters surrounding archipelagos.⁵⁶ Moreover, although several maritime nations, including the United States, have yet to ratify the convention, none expressed their opposition on the provisions governing archipelagos. For example, the United States initially withheld ratification because of the provisions dealing with the deep sea-bed mining regime, but it nonetheless recognized that the 1982 Convention otherwise expressed customary international law; in fact, the treaty has been submitted to the U.S. Senate for ratification.⁵⁷ According to the U.S. State Department, "the convention . . . contains provisions with respect to traditional uses of the oceans which generally confirm maritime law and practice and fairly balance the interests of all states."⁵⁸

53. Vienna Convention on the Law of Treaties, art. 38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. at 138; *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Ice.), 1969 I.C.J. 3, at 43 (Feb. 20) [hereinafter *Continental Shelf*]; see also R.R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 64 (1970); Anthony D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892, n. 4 (1970).

54. *Continental Shelf*, *supra* note 53, at ¶ 74, 77.

55. *Gulf of Maine* (Can v. U.S.) 1984 I.C.J. 246 (Oct. 12); Christopher Joyner, *The Southern Ocean and Marine Pollution: Problems and Prospects*, 17 CASE W. J. INT'L L. 165, 180 (1985).

56. U.N. OFFICE OF LEGAL AFFAIRS, LAWS AND REGULATION ON THE REGIME OF THE TERRITORIAL SEA at 38–39, U.N. Doc. ST/LEG/SER.B/6 (1957); See generally An Act to Define the Baselines of the Territorial Sea of the Philippines, Rep. Act No. 3046 (June 17, 1961) (Phil.), U.N. Doc. ST/LEG/SER.B/15; See generally An Act to Amend Section One of the Republic Act Numbered Thirty Hundred and Forty-Six, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines", Rep. Act No. 5446 (Sept. 18, 1968) (Phil.), U.N. Doc. ST/LEG/SER.B/15; *Note verbale* dated January 20, 1956 from the Philippines, reprinted in II YB ILC 1956, at 69; Announcement on the Territorial Waters of the Republic of Indon. of 14 Dec. 1957, 4 M. WHITEMAN DIGEST OF INT'L LAW 284 (1965).

57. *The U.N. Convention on the Law of the Sea: Hearing on T.Doc. 103–39 Before the United States Senate Comm. on Foreign Relations*, 108th Cong. 1 (2003) (statement of Senator Richard G. Lugar), available at <http://foreign.senate.gov/hearings/2003/hr031014a.html>.

58. Third United Nations Convention on the Law of the Sea, White House Office of Policy Information, Issue Update No. 10 at 8 (April 15, 1983); 83 Dep't of State Bull. No. 2075 at 70 (1983).

2. Appollonia violated the customary international law obligation requiring prior notification for the transportation of ultra-hazardous materials through the waters of third party states

a. Widespread state practice reflects the existence of a norm requiring prior notification for the transport of ultra-hazardous materials

Regardless of the 1982 Convention's applicability to Appollonia, widespread state practice and *opinio juris* evince a clear duty to provide notification under customary international law. Many coastal states and archipelagic nations require notice from shipping states regarding the contents of ultra-hazardous cargoes. Countries on the most important shipping routes, including Oman,⁵⁹ Iran,⁶⁰ Egypt,⁶¹ Guinea,⁶² Malaysia,⁶³ Malta,⁶⁴ Spain,⁶⁵ Peru,⁶⁶ Saudi Arabia,⁶⁷ and Yemen⁶⁸ require not only notification but also prior consent because these states face a high risk of pollution from accidents at sea. Other states, including the Philippines,⁶⁹ Venezuela,⁷⁰ Haiti, Fiji and several Caribbean states⁷¹ go even further by forbidding the transit of any vessel carrying dangerous materials

59. See Declaration of Oman Issued upon Ratification of UNCLOS (Aug. 17, 1989), available at http://www.un.org/Depts/los/convention_agreements/conventions_declarations.html.

60. ACT ON THE MARINE AREAS OF THE ISLAMIC REPUBLIC OF IRAN IN THE PERSIAN GULF AND THE OMAN SEA 1993, Sec. 9 (Iran), reprinted in 24 LAW OF THE SEA BULLETIN 10 (Dec. 1993).

61. See Declaration of Egypt Issued upon Ratification of UNCLOS (Aug. 26, 1983), available at http://www.un.org/Depts/los/convention_agreements/conventions_declarations.html.

62. Presidential Decree of Papua New Guinea, no. 336, 30 July 1980.

63. See Declaration of Malaysia Issued upon Ratification of UNCLOS (Oct. 14, 1996), available at http://www.un.org/Depts/los/convention_agreements/conventions_declarations.html.

64. Act no. XXVIII (Malta, 1981), UN Doc. LE 113 (3-3) (16 November 1981).

65. Act No. 25/64 of 29 April 1964 Concerning Nuclear Energy, ch. XI, B.O.E. (1964), in U.N. Doc. ST/LEG/SER.B/16.

66. Decree No. 027-77-EM, Nov. 16, 1977 (Peru).

67. Declaration of Saudi Arabia Issued upon Ratification of UNCLOS (Apr. 24, 1996), available at http://www.un.org/Depts/los/convention_agreements/conventions_declarations.html.

68. Declaration of Yemen Issued upon Ratification of UNCLOS (July 21, 1987), available at http://www.un.org/Depts/los/convention_agreements/conventions_declarations.html.

69. An Act to Control Toxic Substances and Hazardous and Nuclear Wastes Providing Penalties for Violations Thereof, and for Other Purposes, Rep. Act No. 6969 (Oct. 26, 1990) (Phil.).

70. Art. 54 of Presidential Decree no. 2/211 on Norms on the Control of the Generation and Management of Hazardous Wastes (Venezuela, 1992).

71. See *Note verbale* dated February 18, 1988 from Haiti's Ministry of the Interior, Decentralization, the General Police Force and the Civil Service, in 11 LAW OF THE SEA BULLETIN 13 (July 1988).

through their waters. The United Arab Emirates,⁷² Yemen,⁷³ Djibuti,⁷⁴ Pakistan,⁷⁵ Poland⁷⁶ and Canada⁷⁷ expressly require nuclear propelled vessels and ships carrying dangerous substances to notify transit states of their passage.⁷⁸ Finally, France requires ships transiting through its territorial waters to report the nature of their cargo before entering them.⁷⁹

Further, evidence of state practice is indicated by the strident objections voiced by the international community during the recent voyages of ships carrying ultra-hazardous materials. Several Caribbean and Latin American states, as well as Malaysia, forbade the entrance of the *Pacific Pintail* into their territorial waters.⁸⁰ In July 1999, South Africa ordered two ships carrying MOX to Japan not to enter its territorial sea.⁸¹ In January 2001, an Argentine court ordered the Argentinean government to prevent a British ship (the *Pacific Swan*) carrying an eighty ton cargo of highly radioactive nuclear fuel to Japan from entering waters under its control, arguing it would put the country's shoreline at risk from a toxic spill.⁸²

In 2001, Ireland came before the International Tribunal for the Law of the Sea, seeking provisional measures against the United Kingdom to suspend its decision to construct a MOX plant. Ireland's objections were based on the risks involved in the transport of radioactive material to and from the plant.⁸³ The Tribunal ultimately rejected Ireland's application because it found the situation

72. Federal Law No. 19 in Respect of the Delimitation of the Maritimes Zones of the United Arab Emirates, art. 5(4) Oct. 17, 1993 (U.A.E.).

73. Yemen, Act no. 45/1977, Art. 8 in U.N. Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea* 21, at 24 (1980).

74. Djibuti, Law no. 52/AN/79, Art. 7, in R.W. SMITH, *EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS* 112 (1986).

75. Territorial Waters and Maritime Zones Act, Pakistan, para. 3(3), Dec. 31, 1976, U.N. Doc. ST/LEG/SER.B/19.

76. Act Concerning the Maritime Areas of the Polish Republic and the Marine Admin., 1991, arts. 10 and 11, (Pol.).

77. Transportation of Dangerous Goods Regulations SOR/2001-286 (Can.).

78. Erik Jaap Molenaar, *Navigational Rights and Freedoms in a European Regional Context*, in 35 *NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA* 22, 30 (Donald R. Rothwell & Sam Bateman eds., 2000).

79. Decree No. 78-421 on Sea Pollution Caused by Shipping Incidents, art. 1, Mar. 24, 1978 (Fr.).

80. *Malaysia Bans Ship Carrying Nuclear Waste to Japan*, REUTER NEWS SERVICE, Jan. 15, 1997, <http://www.nci.org/c/cs-malay.htm>; See also Press Release, Papua New Guinea, Shipment of Vitrified High Level Nuclear Waste Must Respect Concerns of Forum Islands Countries (Jan. 24, 1997), <http://www.nci.org/c/cs-png.htm>.

81. *UK Nuclear Fuel Ships Asked to Stay Out of South Africa's Waters*, BBC WORLD BROADCASTS, Report by the South African News Agency SAPA, July 26, 1999, <http://www.nci.org/k-m/moxclips.htm>.

82. *Court Blocks Nuclear Ship from Argentine Waters*, REUTER NEWS SERVICE, Jan. 11, 2001.

83. Memorial of Ireland MOX Plant Case (No. 10) (Ir. v. U.K.), (Int'l Trib. L. of the Sea 2001); Maki Tanaka, *Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Envtl. Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 MICH. J. INT'L L. 337 (2004).

was not urgent;⁸⁴ however, there was no contest as to the potential for environmental harm.⁸⁵

b. Opinio juris reflects the existence of a norm requiring prior notification for the transport of ultra-hazardous materials

States provide notice because of a sense of legal obligation. Virtually all states have accepted specific obligations to notify potentially affected states of the transport of nuclear material through their waters. Over 200 states are party to the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,⁸⁶ the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,⁸⁷ and the 1996 Izmir Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal, all of which require notification to potentially affected states. In addition, the Rio and Stockholm Declarations, as well as the International Atomic Energy Agency's (IAEA) Code of Practice on the International Transboundary Movement of Radioactive Material, recognize the existence of a customary notification obligation.⁸⁸

3. Appollonia's failure to provide notification to Raglan also constitutes a breach of the regulatory regime established by the IAEA for safe transport of nuclear material

Appollonia is a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and a member of the IAEA. Under the NPT, Appollonia was

84. See *MOX Plant Case* (No. 10) (Ir. v. U.K.), (Int'l Trib. L. of the Sea Dec. 3, 2001); See generally, Richard Nadelson, *After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea*, 15 INT'L J. OF MARINE & COASTAL L. 193, n.2 (2000).

85. *Id.*

86. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, art. 6, 1673 U.N.T.S. 57 [hereinafter *Basel Convention*]; TRANSBOUNDARY MOVEMENTS AND DISPOSAL OF HAZARDOUS WASTES IN INTERNATIONAL LAW: BASIC DOCUMENTS 32 (Barbara Kwiatkowska & Alfred H. A. Soons eds., 1993).

87. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 29, 1990 reprinted in 30 I.L.M. 773-99.

88. Conference on Environment and Development, Rio de Janeiro, June 3-14 1992, *Rio Declaration on Environment and Development*, princ. 19, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 13, 1992) [hereinafter *Rio Declaration*]; INT'L ATOMIC ENERGY AGENCY [IAEA], CODE OF PRACTICE ON THE INTERNATIONAL TRANSBOUNDARY MOVEMENT OF RADIOACTIVE WASTE, at III(5), IAEA Doc. GC(XXXIV)920 (June 27, 1990), reprinted in 30 I.L.M. 557, 558 [hereinafter *IAEA Code of Practice*]; United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 21, U.N. Doc A/CONF.48/14 at 3 (1973), reprinted in 11 I.L.M. 1416 [hereinafter *Stockholm Declaration*].

obligated to conduct its nuclear activities in accord with a safeguards agreement with the IAEA.⁸⁹ In administering the safeguards system, the IAEA is authorized to require members to “observ[e] any health and safety measures prescribed by the Agency.”⁹⁰ Because Appollonia is a member of the IAEA and its nuclear program is subject to the IAEA safeguards system, any IAEA rules or regulations relating to health and safety are binding.

The IAEA has adopted specific regulations obligating Appollonia to notify Raglan of its MOX shipments. Section 820 of the IAEA’s Regulations for the Safe Transport of Radioactive Material requires “multilateral approval” for shipments containing radioactive material.⁹¹ The term “multilateral approval” means obtaining approval from “each country through” which the radioactive material is to be transported.⁹² Here, Appollonia failed to comply with these regulations, as confirmed by the IAEA in its final report on Appollonia’s nuclear program: “Appollonia gives no notice to affected States such as Raglan that MOX will be transported through their territorial waters or exclusive economic zones.”⁹³

Because the regulations require the approval of “each country through” which the material is transported, obligations clearly run to third states not party to the IAEA regime. Both Appollonia and Raglan are parties to the Vienna Convention on the Law of Treaties (VCLT). While a treaty generally only creates reciprocal rights between parties to the treaty, Article 36 of the VCLT provides that rights in a treaty can arise for third parties if the parties to the treaty so intend and the third party state assents thereto.⁹⁴ The assent of the third party state “shall be presumed” so long as nothing contrary is indicated.⁹⁵ Because there is no indication of contrary intent, Raglan has the right to raise Appollonia’s violation of the IAEA regulations under Article 36 of the Vienna Convention on the Law of Treaties, even though it is not party to the NPT or a member of the IAEA.

89. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 121 U.S.T. 483, 729 U.N.T.S. 161, art. III [hereinafter NPT].

90. Statute of the Int’l Atomic Energy Agency, art XIII, 1973, Int’l Atomic Energy Agency, available at http://www.iaea.org/About/statute_text.html.

91. INT’L ATOMIC ENERGY AGENCY, REGULATIONS FOR THE SAFE TRANSPORT OF RADIOACTIVE MATERIAL § 820 (1996) [hereinafter IAEA Regulations].

92. *Id.* at § 204.

93. Compromis, ¶ 9.

94. Vienna Convention, *supra* note 53, art. 34.

95. *Id.* art. 36; I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1969).

D. Appollonia Is Responsible For All Environmental Damage To The Norton Shallows And Must Compensate Raglan For The Resulting Injury To Its Fishing And Tourist Industries And The Cost Of Decontaminating The Area

1. Raglan has standing under international law to seek redress on behalf of the international community for a violation of the *erga omnes* obligation to protect the marine environment

Raglan's claim for damage to the Shallows relies upon the *erga omnes* doctrine. This Court has recognized that there are certain obligations owed to the international community *erga omnes* and that all states have a legal interest in upholding them.⁹⁶ Customary international law recognizes the obligation on the part of all states to "protect and preserve the marine environment." All nations have accepted the obligation to ensure against activities that "cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."⁹⁷

Appollonia may argue that the international community has never recognized the ability to bring a claim *actio popularis*, on behalf of all people. This argument is misguided. In the *Southwest Africa* case, this Court, while refusing to recognize a claim *actio popularis*, intimated it was emerging.⁹⁸ Subsequently, in *Barcelona Traction*, this Court considered that, in view of the importance of obligations owed to the international community as a whole, "all states can be held to have a legal interest in their protection."⁹⁹ Additionally, distinguished publicists have repeatedly urged this Court to recognize *actio popularis* in various contexts, particularly as a technique to ensure protection of the environment.¹⁰⁰

If the concept of *actio popularis* were ever to be recognized by this Court, surely this is the case. The damage to the Shallows was proximate to Raglan and resulted in serious economic consequences. Additionally, Raglan is party to numerous treaties establishing the duty to protect the marine environment. While no singular injury may be sufficient to confer standing upon Raglan, the totality of the circumstances in this case point towards this Court's recognition of an *actio popularis*. Without this extension, no state may legally protect the interests of the high seas. To require a territorial injury to states seeking to

96. *Nuclear Tests (Austl. v. Fr.)* 1974 I.C.J. 253, 310 (June 22); *Barcelona Traction Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter *Barcelona Traction*].

97. *Stockholm Declaration*, *supra* note 88.

98. *Barcelona Traction*, *supra* note 96, at ¶ 47; *Sw Africa Case (Second Phase)* (Eth. and Liber. v. S. Afr.) 1966 I.C.J. 6 (July 18).

99. *Barcelona Traction*, *supra* note 96, at ¶ 33; *See also Nuclear Tests*, 1974 I.C.J. at 321.

100. IAN BROWNLIE, *A Survey of International Customary Rules of Environmental Protection*, in *INTERNATIONAL ENVIRONMENTAL LAW* 1, 5 (1974).

uphold the duty to protect the marine environment renders that norm a virtual nullity. In such circumstances, the cost to each state of damaging common spaces would be externalized,¹⁰¹ and the earth's common spaces would be severely abused.

2. Appollonia breached the internationally recognized obligation to prevent transboundary injury

The customary international law obligation to prevent transboundary environmental harm is rooted in Principle 21 of the Stockholm Declaration, which establishes state responsibility for transboundary environmental harm.¹⁰² Although the drafters opted for a non-binding declaration of principles, various treatises,¹⁰³ textbooks,¹⁰⁴ and scholars¹⁰⁵ state that Principle 21 reflects customary international law. Indeed, it has been called the cornerstone of international environmental law.¹⁰⁶

a. Appollonia incurs liability for damage to the Shallows under the *sic utere tuo* principle

The principle of *sic utere tuo ut alienum non laeda* (one must use his own so as not to damage that of another) imposes an obligation on states to prevent transboundary environmental injury.¹⁰⁷ Raglan submits that *sic utere tuo* is customary law in the area of transnational environmental injury, as evidenced by its incorporation into a number of international treaties¹⁰⁸ and declarations,¹⁰⁹

101. L.F.E. Goldie, *The Management of Ocean Resources: Regimes for Structuring the Maritime Environment*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 172 (Cyril E. Black & Richard A. Falk eds., 4th vol. 1972).

102. Stockholm Declaration, *supra* note 88, at princ. 21; John Knox, The Myth and Reality of Transboundary Envtl. Impact Assessment, 96 Am. J. Int'l L. 291, 296 (2002).

103. ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 130 (1991); *DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW* 7 (Philippe Sands et al. eds., 1994) [hereinafter *DOCUMENTS*]

104. EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 317 (1998).

105. David Wirth, *The Rio Declaration on Env't and Dev.: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 620 (1995); Rudiger Wolfrum, *Purposes and Principles of International Environmental Law*, 1990 GER. Y.B. INT'L L. 308, 310.

106. *DOCUMENTS*, *supra* note 103, at 7; WEISS ET AL., *supra* note 104, at 316.

107. Armin Rosencranz, *The Origin and Emergence of International Environmental Norms*, 26 HASTINGS INT'L & COMP. L. REV. 309, 309 (2003); Bernard A. Weintraub, *Science, Int'l Envtl. Regulation, and the Precautionary Principle: Setting Standards and Defining Terms*, 1 N.Y.U. ENV'T L. J. 173, 204-09 (1992).

108. See UNCLOS, *supra* note 4, at art. 194(2); Convention on Biological Diversity, June 5, 1992, *prmb.*, 1760 U.N.T.S. 79.

109. *Rio Declaration*, *supra* note 88, princ. 2; *Stockholm Declaration*, *supra* note 88.

including the 1982 Convention, and international decisions holding states responsible for extraterritorial environmental harm regardless of fault.¹¹⁰

Several cases illustrate the *sic utere tuo* principle. In the 1941 *Trail Smelter Arbitration*,¹¹¹ the tribunal applied the principle in holding Canada responsible for agricultural damage in the United States resulting from sulphur dioxide fumes emitted from a private smelter in British Colombia. Likewise, in *Corfu Channel*¹¹² this Court held that every state has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of States."¹¹³ In the 1974 *Nuclear Test Cases* before this Court, Judge de Castro confirmed the obligation to prevent transboundary harm as a principle of international law.¹¹⁴ More recently, the decision of this Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*¹¹⁵ evidences the existence of the obligation to prevent transboundary environmental harm arising from hazardous activities. Other arbitral awards, including the *Lac Lanoux*¹¹⁶ and *Gut Dam*¹¹⁷ arbitrations, confirm the existence of this obligation. While Appollonia has a right to pursue its own economic and environmental policies, in accordance with international law,¹¹⁸ it has an obligation to ensure that activities within its control do not damage the environment beyond the limits of national jurisdiction.¹¹⁹

b. Appollonia incurs liability for damage to the Shallows under the precautionary principle

Appollonia's failure to take adequate precautions to safeguard its MOX shipments violates the precautionary principle. A number of present day international legal instruments enshrine this doctrine,¹²⁰ evidencing its general

110. See *Trail Smelter (U.S. v. Can.)*, 3 R. Int'l Arb. Awards 1905 (Perm. Ct. Arb. 1938), reprinted in 35 AM. J. INT'L L. 684 (1941); *Legality of the Threat of Use of Nuclear Weapons*, 1996 I.C.J. Lexis at 40; *Gabcikovo-Nagymaros Project*, 1997 I.C.J. at 41.

111. See *Trail Smelter*, 3 R. Int'l Arb. Awards at 1905.

112. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

113. *Id.*

114. *Nuclear Tests*, 1974 I.C.J. at 389.

115. *Legality of the Threat of Use of Nuclear Weapons*, 1996 I.C.J. Lexis at 40.

116. *Affaire du Lac Lanoux (Spain v. Fr.)*, 22 R. Int'l Arb. Awards 281, 314-317 (Perm. Ct. Arb. 1957).

117. *Gut Dam Arbitration*, 7 CAN. Y.B. INT'L L. 316, 316-18 (1969).

118. *Rio Declaration*, *supra* note 88, *princ. 2*.

119. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Int'l Law Comm'n, 56th Sess., Supp. No. 10 UNGAOR A/56/10 (Nov. 2001).

120. See *Rio Declaration*, *supra* note 88, *princ. 15*; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. I, Nov. 13, 1972, 26 U.N.T.S. 2406; See U.N. Framework Convention on Climate Change, art. 3, *opened for signature* May 9, 1992, *reprinted in* 31 I.L.M. 849.

acceptance as a norm of customary international law.¹²¹ Indeed, in the environmental context, there are no instances of nations refusing to apply the precautionary principle.¹²² The European Union promulgated the precautionary principle as a binding principle of their environmental policy.¹²³

The 1992 Rio Declaration on Environment and Development provides that it is necessary for states to “apply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long-term or irreversible adverse effects upon it.”¹²⁴ The principle recognizes that states using the oceans must err on the side of protecting the environment.¹²⁵ A state that fails to assess the extraterritorial environmental impact of its proposed activities can hardly claim that it has taken all practical measures to prevent environmental damage.¹²⁶ Accordingly, the precautionary principle shifts the burden of proof in environmentally risky activities to the state that engages in the activity.¹²⁷

Appollonia had a customary international law obligation to evaluate the possible effects of transporting nuclear materials through the Raglanian archipelago and to determine the deadly consequences that could result from an accident. Appollonia’s failure to reassess its plan of action after being delayed by storms is but one example of Appollonia’s failure to take the necessary precautions. These failures incur Appollonia liable for the damages to the Norton Shallows caused by *The Mairi Maru*.

3. Appollonia is strictly liable for the damage to the Norton Shallows

a. *Strict liability for ultra-hazardous activities is a general principle of law*

The principle of strict liability for ultra-hazardous activities is a general principle of international law and may be applied in this case.¹²⁸ The principle

121. Legality of the Threat of Use of Nuclear Weapons, 1996 I.C.J. Lexis at 40; *Communication from the Commission on the Precautionary Principle*, COM (2000)1 (Feb. 2, 2000).

122. See Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT’L L. 379 (1996).

123. See DAVID HUNTER, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 405-11 (2d ed. 2002).

124. Conference on Environment and Development, Rio de Janeiro, June 3-14 1992, *Report of the United Nations Conference on Environment and Development*, para. 17.22, U.N. Doc. A/CONF.151/26 (Vol. II) (Aug. 13, 1992).

125. Van Dyke, *supra* note 122, at 383.

126. 126. Phoebe N. Okowa, *Procedural Obligations in Int’l Envtl. Agreements*, 67 BRIT Y.B. INT’L L. 275, 279 (1996).

127. Daniel Bodansky, *The Precautionary Principle in U.S. Environmental Law*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE 203, 210 (Tim O’Riordan & James Cameron eds., 1994).

128. UNCLOS, *supra* note 4, § 1(A), part 1 & n.8 pp. 2-3; See PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 92-98 (1994); Pierre-Marie Dupuy, *Overview of the*

of strict liability has its roots in antediluvian law,¹²⁹ and is found in the modern legal systems of most states.¹³⁰ Strict liability of states, even in conducting "not unlawful" ultra-hazardous activities, has been accepted in conventions concerning nuclear activities, outer space activities, and marine oil pollution.¹³¹ These conventions articulate the principle that a state may be liable even though its activities were not wrongful.¹³² The ILC approved this general concept of liability without unlawfulness.¹³³

State practice supports this proposition. Several multilateral treaties hold states operating nuclear ships strictly liable for nuclear damage caused by an accident involving nuclear fuel or wastes from the ship.¹³⁴ The Organization for Economic Cooperation and Development, whose members include the United States, United Kingdom, and Japan, adopted the "polluter pays" principle in relation to routine accidental pollution.¹³⁵ The European Union moved toward formal adoption of strict liability for environmental pollution in June 2003.¹³⁶ A recent survey showed that the doctrine of strict liability applies in such diverse legal systems as the Federal Republic of Germany, the U.S., Mexico,

Existing Customary Legal Regime Regarding International Pollution, in *INTERNATIONAL LAW AND POLLUTION* 61, 63-64 (Daniel Barstow Magra ed., 1991).

129. See, e.g., LUDOVIC BEAUCHET, 4 *HISTOIRE DU DROIT PRIVÉ DE LA RÉPUBLIQUE ATHÉNIENNE* (1976); *THE CODE OF MAINMONIDES: BOOK OF TORTS (BOOK XI)* (Hyman Klein trans., 1954); *THE HAMMURABI CODE*, arts. 195-246 (Chilperic Edwards trans., Kennikat Press 2003) (1904).

130. Vernon Palmer, *A General Theory of The Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 *TUL. L. REV.* 1303, 1309 (1988); see also *Sobranie Postanovlenii Sovieta Ministrov [Rsfsr]* [Collection of Rsfst Gov't Regulations] 1964, § 454 (U.S.S.R.); *Code. civ. art. 1384 (Fr.)*; *Restatement (Second) of Torts* § 519 (1977). See also, *Ryland v. Fletcher*, L.R. 1 H.L. 330, 337, 341 (1868); Francis Bohlen, *The Rule in Ryland v. Fletcher*, 59 *U. PA. L. REV.* 298, 310 (1911).

131. See, e.g. Vienna Convention on Civil Liab. for Nuclear Damage, May 21, 1963, 2 *I.L.M.* 727,733; Convention on International Liability for Damage Caused by Space Objects, art. II, Mar. 21, 1972, 24 *U.S.T.* 2389, 961 *U.N.T.S.* 187.

132. Constance O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the Int'l Law Comm'n on the Topic of Int'l Liab. for Injurious Consequences Arising Out of Acts Not Prohibited by Int'l Law*, 18 *DENV. J. INT'L L & POL'Y* 145, 147 (1990).

133. Fourth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited By International Law, *U.N. Doc. A/CN.4/373* (1983); Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES* 61, 76-79 (Alan Boyle & David Freestone eds., 1999).

134. See Paris Convention on Third Party Liab. in the Field of Nuclear Energy and its Additional Protocol, Jan. 28, 1964, 956 *U.N.T.S.* 264; Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 31, 1963, 2 *I.L.M.* 685.

135. The Organization for Economic Cooperation, *The Implementation of the Polluter-Pays Principle*, art. III(1), Doc. No. C(74)223 (Nov. 14, 1974), available at <http://sedac.ciesin.org/entri/texts/oced/OCED-4.09.html>.

136. Treaty Establishing the European Economic Cmty., art. 130R, Mar. 25, 1957, 298 *U.N.T.S.* 11; Council Recommendation (EEC) of Mar. 3, 1975, O.J. (L 194) 1.

Venezuela, Egypt, Libya, Senegal, Madagascar, Ethiopia, India, Thailand, Syria, Kuwait, Iraq, Lebanon, Turkey, and Japan and is part of the civil codes of Russia and France.¹³⁷ Even publicists generally resistant to the notion of strict liability acknowledge the responsibility of flag states for ultra-hazardous vessel conduct.¹³⁸ Appollonia is strictly liable for any damage caused by the transportation of ultra-hazardous waste through the Raglanian archipelago.

b. Appollonia is strictly liable for any damage caused by the transportation of ultra-hazardous waste through the Raglanian Archipelago

For strict liability to attach to a state in connection with private activity, international law requires 1) an ultra-hazardous activity 2) of transnational character 3) under the control of the state.¹³⁹ These conditions are clearly met in this case. First, transportation of radioactive material, such as MOX, is an ultra-hazardous activity.¹⁴⁰ Second, the injury is of transnational character because Appollonia's actions caused damage beyond the area of its national jurisdiction. Finally, Appollonian officials commissioned *The Mairi Maru* to transport the ultra-hazardous material.

Appollonia may argue that the decision by the crew of *The Mairi Maru* to transit through the Raglanian archipelago was that of a private vessel and is thus not attributable to Appollonia. However, conduct of private individuals may be directly imputable to a state where the individuals acted on behalf of the state, having been charged to carry out a specific operation.¹⁴¹ When a state assumes legal authority over a ship by grant of its flag, the state also assumes an obligation to take measures to ensure that the vessel acts in a fashion consistent with international law.¹⁴² Here, the Appollonian government charged *The Mairi Maru's* captain and crew with the transportation of MOX. As a result, Appollonia was responsible for insuring that the vessel complied with its

137. See, e.g., JOHAN LAMMERS, TRANSFRONTIER POLLUTION AND INTERNATIONAL LAW 101-03 (1985); J.M. Kelson, *State Responsibility and the Abnormally Dangerous Activity*, 13 HARV. INT'L J. 209, 216 (1972).

138. WILFRED JENKS, LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES IN INTERNATIONAL LAW (1967); N. A. Ushakov, Report of the Commission to the General Assembly, Report of the International Law Commission on the Work of its 26th Session, reprinted in [1974] 2 Y.B. INT'L L. COMM'N 157 (pt. 1); Gunther Handl, *State Liab. for Accidental Transnat'l Envtl. Damage by Private Persons*, 74 AM. J. INT'L L. 525, 565 (1980).

139. Kelson, *supra* note 137, at 209; See generally, Jenks, *supra* note 138, at 151.

140. Jenks, *supra* note 138, at 193.

141. Roberto Ago, *Third Report on State Responsibility*, U.N. Doc. A/CN.4/246 and ADD.1-3, reprinted in [1971] 2 Y.B. INT'L L. COMM'N 199 (pt. 1); *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24).

142. BOLESŁAW ADAM BOCZEK, FLAGS OF CONVENIENCE (1962); ROBERT RIENOW, THE TEST OF NATIONALITY OF A MERCHANT VESSEL (1937).

obligations under international law and is obliged to make reparations for the injuries suffered by Raglan.

4. Assuming a fault-based standard applies to the incident involving The Mairi Maru, the damage caused to the Norton Shallows was foreseeable and imputable to Appollonia

Appollonia may argue for a due diligence approach to liability.¹⁴³ Under this approach, each state has a duty to exercise "due diligence" to ensure suitable protection of the rights of other states.¹⁴⁴ The standard of due diligence required depends upon the particular situation; protection of the environment requires an especially high degree of diligence.¹⁴⁵ It is a general principle of law that the exact nature of the ensuing damage need not be foreseeable; it is sufficient if that type of harm ought to have been foreseen.¹⁴⁶ Each state has a duty to take steps to prevent any vessel flying its flag from engaging in conduct harmful to the environment of another state.¹⁴⁷

Appollonia must have been aware that its MOX shipments presented a serious risk of danger: the substances that leaked into the waters off the Norton Shallows were highly noxious, and the ship's path led straight through the shallow waters of Raglan's archipelago. Given Appollonia's inability to adequately protect these shipments, and the transnational risks associated with transporting it, due diligence required some control over the way in which *The Mairi Maru* went about its transport.

VII. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, the Kingdom of Raglan, respectfully requests this Honorable Court to find, adjudge, and declare as follows:

1. That Raglan is not responsible for the attack on *The Mairi Maru*, and owes no Appollonia no compensation for any injury arising from the attack.

143. Alan Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L.Q. 1, 14-15 (1990); David D. Caron, *The Law of the Env't: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 536 (1999).

144. Riccardo-Pisillo-Mazzechi, *Forms of International Responsibility for Environmental Harm*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15, 21 (Francesco Francioni & Tullio Scovazzi eds., 1991); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LEGAL ASPECTS OF TRANS-FRONTIER POLLUTION 384 (1977).

145. *Id.* at 371.

146. *Hughes v. Lord Advocate* (1963) A.C. 837, 847 (H.L.).

147. *Jenks, supra* note 138, at 141.

2. That Raglan breached no obligation owed to Appollonia under international law by scuttling *The Mairi Maru*.
3. That Appollonia violated international law by shipping MOX through Raglan's archipelagic waters without giving Raglan prior notice or receiving its consent.
4. That Appollonia is responsible for the damage to the Norton Shallows and must compensate Raglan for the injury to its fishing and tourist industries and the cost of decontaminating the area.

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